No. 01-963

Supreme Court, U.S
FILED
JUN 17 2002
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IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

JOINT APPENDIX
Volume Two

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June 17, 2002

PETITION FOR CERTIORARI FILED JANUARY 2, 2002
CERTIORARI GRANTED APRIL 1, 2002

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix of the 01-963 Petition for a Writ of Certiorari at the following pages:

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DEFENDANT'S EXHIBIT 1

---

1. A reliable history of exposure.

2. An appropriate time interval between exposure and detection (see pages 9-10).

Furthermore, we regard the following clinical criteria to be of recognized value:

1. Chest roentgenographic evidence of type "s," "t," "u," small irregular opacifications of a profusion of 1/1 or greater.

2. A restrictive pattern of lung impairment with a forced vital capactiy below the lower limit of normal.

3. A diffusing capacity below the lower limit of normal.

4. Bilateral late or pan inspiratory crackles at the posterior lung bases not cleared by cough.

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Apr 23 1998]

Clifford Arthur Vance	Civil Action No. 92-C-5829
Freeman Ray Ayers	Civil Action No. 93-C-6857
Carl Richard Butler	Civil Action No. 93-C-6876
James McCoy Spangler	Civil Action No. 93-C-7004
Doyle Johnson	Civil Action No. 92-C-8888
John T. Shirley, *et ux.*,	Civil Action No. 92-C-8970
Plaintiffs,	

v.

Norfolk And Western Railway Co.,
Individually and as successor to
the Norfolk Southern Railway Company,
a Virginia Corporation, et al.,

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S MEMORANDUM REGARDING CAUSATION AND APPORTIONMENT

Defendant Norfolk and Western Railway Company (hereinafter "N&W" or "defendant), by counsel, hereby sets forth its Memorandum regarding Causation and Apportionment.

A. Rogers v. Missouri Pacific Railroad Co Established Only "The Test Of A Jury Case"

Section 51 of the Federal Employers' Liability Act (FELA) provides, in pertinent part, that common carriers by railroad shall be liable in damages for any "injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier. . . ." 45 U.S.C. § 51. Although this statute provides the general (and unremarkable) rule that a railroad may be liable for an injury to an employee

caused by a railroad's negligence, the statute does not explicitly address the issue of whether a railroad is liable for *all* damages associated with a particular claimed injury or health condition regardless of its cause or instead is liable only for the injuries or damages it caused.

The United States Supreme Court has answered the question of the extent of damages owed by a negligent railroad employer when it has caused only a fraction of a plaintiff's claimed injuries. It answered the question in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L.Ed. 493 (1957). In *Rogers*, the plaintiff's primary duty was to ensure that fires used to control weed growth did not burn out of control. The jury returned a verdict for the plaintiff who was injured when he fell into a culvert after he was overtaken by flames and smoke from the weed control fires while watching for "hot boxes" on passing trains. The Supreme Court of Missouri had reversed the verdict for plaintiff on the grounds that plaintiff's evidence did not support the jury's finding of defendant's liability.

The United States Supreme Court reversed the ruling of the Supreme Court of Missouri because . . .

> . . . [u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, *if that test is met, are bound to*

> *find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. . . .*

Rogers, 352 U.S. 500, 506-507 (1957) (footnotes omitted) (emphasis added).

Some courts at the urging of plaintiffs' counsel have distorted the text of the FELA and the holding in *Rogers* to argue that it sets the "the test of liability of the railroad carrier" and that a railroad defendant is solely liable for *all* damages attributable to an injury if the railroad's negligence played any part, no matter how small, in bringing about the injury. *Rogers* does not concern the standard to be followed by a jury in a FELA case when assessing negligence, but rather concerns whether evidence is sufficient *to submit the case to the jury*. "The court in that case (*Rogers*), however, was not speaking of 'the test of liability of the railroad carrier'. . . but 'the test of a jury case.'" *Bertrand v. Southern Pacific Co.*, 282 F.2d 569, 573 (9th Cir. 1960).

Recently, the Fifth Circuit explained yet again the meaning of the *Rogers* opinion. In *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) the court said:

> Under the Jones Act, seamen are afforded rights parallel to those of railway employees under the Federal Employers' Liability Act ("FELA"). 46 U.S.C. §167; 688. Section 51 of the FELA provides, in pertinent part, that "*every common carrier by railroad . . . shall be liable in damages . . . for such injury or death* resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. §167; 51 (emphasis added). A seaman is entitled to recovery under the Jones Act, therefore, if his employer's negligence is the cause, in whole or in part, of his injury. In their earlier articulations of §167; 51 liability, courts had replaced the phrase "in whole or in part" with the adjective "slightest. " In *Rogers, v.*

Missouri Pacific R. Co., 352 U.S. 500, 506 (1957), the Supreme Court used the term "slightest" to describe the reduced standard of causation between the employer's negligence and the employee's injury in FELA §167; 51 cases. In *Ferguson v. Moore-McCormack Lines., Inc.*, 352 U.S. 521, 523 (1957), the Court applied the same standard to a Jones Act case, writing, "'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" (quoting *Rogers*, 352 U.S. at 506).

> *Nothing in these cases, then, supports the proposition that the duty of care owed is slight. Rather, the phrase "in whole or in part" as set forth in the statute, or, as it has come to be known, "slightest," modifies only the causation prong of the inquiry. The phrase does not also modify the word "negligence." The duty of care owed, therefore, under normal rules of statutory construction, retains the usual and familiar definition of ordinary prudence. See Texas Food Indus. Assoc. v. United States Dept. of Agriculture*, 81 F.3d 578, 582 (5th Cir. 1996) (stating it is a "cardinal canon of statutory construction . . . that [in interpreting a statute,] the words of a statute will be given their plain meaning").

Despite the clarity of the Supreme Court's decisions, the word "slightest," used initially to refer to the quantum of evidence of an employer's breach of duty necessary to sustain a jury verdict, soon took on a different referent. Once the Supreme Court had reduced the statutory language "in whole or in part" to "any part, even the slightest," it was not long before our court further reduced the phrase "any part, even the slightest" to a shorthand expression of "slight negligence" or "slight evidence of negligence." Thereafter we used the

> phrase "slight negligence" uncritically. Justice Frankfurter's comment on the (mis)use of the phrase "assumption of the risk" in FELA actions aptly applies to our discussion today; "A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring). The same holds true of our use of the phrase "slight negligence" or "slight care" in Jones Act negligence cases.

Gautreaux, 107 F.3d at 335 (emphasis added).

Rogers clearly concerns *only* the "test of a jury case" and does not set a negligence standard. Neither does it establish the principle that a railroad is liable for all damages arising out of an injury or medical condition.

While some courts have misconstrued the holding in *Rogers*, *Rogers* clearly did not set forth the proposition that slight causation on the part of a railroad rendered moot other causes of plaintiff's injuries. *Rogers* merely held that a jury verdict should not be overturned if "the proofs justify with reason the conclusion that employer negligence played any part" in causing the injury or death. *Rogers*, 352 U.S. at 506. As courts have correctly noted, the language from *Rogers* established the test of a jury case under the FELA but does not establish a test for liability under the FELA. *Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993). Based on this recognition, courts have reversed verdicts in cases in which the "even the slightest" language has been included in the jury instructions. *See, e.g. Bertrand v. Southern Pac. Co.*, 282 F.2d 569 (9th Cir. 1960), *cert. denied* 365 U.S. 816 (1961).

The Supreme Court did not hold in *Rogers* that a railroad is liable for 100 % of the damages attributable to an injury if the injury was caused in whole or in part by factors unrelated to

the railroad's negligence. A plaintiff suing under the FELA must prove that his injury was caused by the railroad's negligence. If a plaintiff proves that his injury was caused, in whole or in part, by the defendant railroad's negligence, then he is entitled to collect only the damages that are attributable to the portion of the injury caused by the railroad's negligence. *See Dale v. Baltimore & Ohio R. Co.*, 552 A.2d 1037 (Pa. 1989); *See also, Shupe v. New York Central System*, 339 F.2d 998 (7th Cir. 1965) (plaintiff cannot recover damages which are not proximately caused by defendant's alleged negligence).

West Virginia judges in FELA trials routinely give clear instructions to juries that a railroad defendant is liable *only* for the damages it has caused, and *is not* liable in damages for other health problems or for the proportion of a plaintiff's injury not caused by the railroad's negligence.

For example, Judge Charles Haden II in *Gradis Boyd, et al. v. CSX Transportation*, U.S.D.C., S.D. of W.Va., Docket No. 3:87-0973 instructed the jury:

> The defendant is not to be held responsible for any hearing loss or tinnitus or both which the plaintiff may have suffered which resulted from any cause other than the negligence proven by the evidence. Any hearing loss or tinnitus which you find to be attributable to any other cause and which was not the direct result of negligence of the defendant, as proven by the evidence, would not be a part of this action and that should not be considered by you.

See Page 522, *Boyd Trial Transcript*, attached hereto as *Exhibit A*.

Judge Kendrick King in *James E Perry v. N&W*, Civil Action No. 93-C-762, Circuit Court of McDowell County, West Virginia, instructed the jury:

> If you find that any of the plaintiff s claimed damages are due in part, no matter how large or small, to any cause other than the defendant's negligence, the defendant is not financially responsible for that other part.

See Page 712, *Perry Trial Transcript*, attached hereto as *Exhibit B*.

In *Keith Peyton v. CSXT*, Civil Action No. 91-C-101, Circuit Court of Boone County, West Virginia, Judge E. Lee Schlaegel, Jr. instructed the jury:

> In this matter the defendant is only responsible to pay damages to the plaintiff for that portion of his injury, if any, that were caused by its negligence. Therefore if you find that the plaintiff's condition was caused by factors other than the acts or failures to act by the defendant, if any, whether the other cause to be as a result of the plaintiff's own conduct or some other factor the defendant cannot be held responsible for that percentage of plaintiff's condition.

See Page 1182, *Peyton Trial Transcript*, attached hereto as *Exhibit C*.

Clearly, West Virginia trial court judges have routinely instructed juries that railroad employers are liable *only* for what they cause.

In *Consolidated Rail Corp. v. Gottshall*, 114 S.Ct. 2396 (1994), the United States Supreme Court exhaustively examined the statutory framework of the FELA to determine whether a negligent infliction of emotional distress claim was cognizable under its provisions. Because the FELA is silent as to such a claim, the United States Supreme Court reasoned that courts should look to common-law principles in

interpreting the FELA if such principles are not expressly rejected by the FELA:

> [A]lthough common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis. Because the FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in our decision.

Gottshall, 114 S.Ct. at 2404.

After comprehensively reviewing the common-law principles, the Court concluded that because negligent infliction of emotional distress was a tort recognized in certain forms by the common-law, such a claim was therefore cognizable under the FELA. *Gottshall*, 114 S.Ct. at 2407-2408.

In the present case, because the FELA is silent as to whether a railroad is liable only for the injuries it caused or for all injuries suffered by the plaintiff (including injuries sustained as the result of the plaintiff's conduct) if it caused any injury to the plaintiff, common-law principles must be examined to determine the appropriate causation standard to be employed in an FELA case and particularly an FELA occupational disease case such as the present case where the alleged injury (breathing problems) can result from both occupational and non-occupational causes. Under the common-law, it is axiomatic that a person who negligently causes harm to another is liable only for that portion of the harm that results from the actor's negligence. As the RESTATEMENT (SECOND) OF TORTS § 430 makes clear:

> § 430 Necessity of Adequate Causal Relation
>
> In order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the

negligence of the actor be a legal cause of the other's harm.

Significantly, the Restatement further mandates that harm attributable to various causes be apportioned between or among those causes in determining the liability of a negligent actor:

> § 433A Apportionment of Harm to Causes
>
> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

RESTATEMENT (SECOND) OF TORTS § 433A.

As these principles make clear, a railroad is only liable for those injuries caused by its negligence under the FELA and is not liable for injuries that result from other causes.

Consistent with this rule, the Supreme Court of Pennsylvania in *Dale v. Baltimore & Ohio R.R. Co.*, 552 A.2d 1037 (Pa. 1989), held that a railroad is liable only for those injuries caused by its negligence, not for conditions or injuries suffered by the plaintiff that may have resulted from other causes. In *Dale*, as in the present case, Dale alleged that he suffered from a lung impairment due to asbestos-related disease as the result of his exposure to asbestos while employed by the B&O. In response to the medical testimony offered by Dale that his lung condition was caused by asbestos exposure, the B&O offered evidence that Dale suffered from a lung disease that he had contracted prior to his work for the B&O.

The Supreme Court of Pennsylvania recognized that 45 U.S.C. § 51, in isolation, did not explicitly answer the question of whether a railroad is liable for all damages attributable to an injury where the railroad caused only a part of the

injury. The Court rationalized that because 45 U.S.C. § 53 provides that an employee's contributory negligence shall diminish his recovery in proportion to the amount of negligence attributable to such employee . . .

> . . . it is implicit in the statutory scheme that liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused.

Dale at 1041.

The Supreme Court of Pennsylvania went on to hold:

> (A)n employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

Id. at 1041.

Applying the reasoning of the Pennsylvania Supreme Court, N&W is liable only for those injuries attributable to its alleged negligence. If plaintiffs' alleged injuries were caused in whole or part by other persons or entities, the defendant must be allowed to put on evidence of the alternative causes of plaintiffs' injuries and the jury must be instructed to consider the evidence in its deliberations.

B. Courts Routinely Receive Apportionment Evidence And Give Apportionment Instructions

Courts handling Federal Employers' Liability Act cases routinely admit evidence and give instructions concerning apportionment of damages. This shows that the principle of apportionment in FELA cases is so well-accepted as to be axiomatic.

In *Sauer v. Burlington Northern*, 106 F.3d 1490 (Tenth Cir. 1996), the plaintiff was a railroad conductor who had suffered two workplace accidents and hurt his back in each accident. The jury found the Burlington Northern negligent with regard to the second accident only. On appeal, the plaintiff complained there was insufficient evidence from which the jury could apportion his injuries between his pre-existing back condition and the two workplace accidents.

The Tenth Circuit held there was enough evidence to permit the jury to apportion damages, and went on to say: "The extent to which an injury is attributable to a preexisting condition or prior accident need not be proved with mathematical precision or great exactitude. The evidence need only be sufficient to permit a rough practical apportionment." *Sauer*, 106 F. 3d at 1494 (citations omitted). In addition, the *Sauer* court also noted that apportionment can be proved *without expert testimony* stating the percentage of injury attributable to the different causes. *Sauer*, 106 F.3d at 1494.

In *Stevens v. Bangor And Aroostook Railroad Company*, 97 F.3d 594 (1st Cir. 1996) the plaintiff injured his back at work. Two weeks before trial began he suffered a "cardiac event" about which defendant wished to question plaintiff to show his future life span was limited. While the defendant was prohibited from questioning plaintiff on this issue because it did not timely disclose an intention to do so before trial, the appellate court recognized that the defendant railroad could have asked these questions had it only notified plaintiff it was going to do so:

> If post-accident health problems have an impact on a plaintiffs ability to work or on his life expectancy and arise independently of the accident, defendant is entitled to adduce evidence of such problems in an effort to reduce a potential damages award.

Stevens, 97 F.3d at 599.

The *Stevens* court went on to observe that as a general rule when a defendant's negligence aggravates a plaintiff's pre-existing health condition, the defendant is liable only for the additional increment caused by defendant's negligence and not for the pain and impairment plaintiff would have suffered had the accident never occurred. *Stevens*, 97 F.3d at 601.

In *Varhol v. National Railroad Passenger Corporation*, 909 F.2d 1557 (7th Cir. 1990) (*en banc*), the court upheld the use of interrogatories asking the jury "to determine what portion of [plaintiff's] condition . . . resulted from the [accident], and, if it could determine that portion, to take it into account in determining damages." *Varhol*, 909 F.2d at 1564. Plaintiff had Multiple Sclerosis, and the court permitted evidence and instructions about apportioning plaintiff damages between plaintiff's MS and his workplace injuries, including any aggravation of the symptoms of the MS which the workplace injuries caused.

In *Gallimore v. Missouri Pacific Railroad Company*, 635 F.2d 1165 (Fifth Cir. 1981) the plaintiff, a railroad brakeman, was injured in a train coupling accident. In the first of two trials, the jury found defendant was not negligent, but found plaintiff was responsible for only 80% of his "injuries." *Gallimore*, 635 F.2d at 1166. The district court thought the verdict was inconsistent since defendant was not found to be 20% at fault, and granted a new trial. Immediately before the second trial, the case was transferred to another judge. *Gallimore*, 635 F.2d at 1169. At the conclusion of the second trial, the jury found defendant negligent and plaintiff contributorily negligent, and awarded $390,000 in damages. The district court then granted the railroad's post-trial motion and entered judgment on the *first* jury's verdict.

On appeal, the Fifth Circuit said that the first jury's verdict finding Gallimore 80% negligent and the Missouri Pacific not at all negligent *was not inconsistent* because there was . . .

> . . . ample testimony in the record to indicate that there were other contributing causes to Gallimore's injuries besides any negligence that was involved in the train accident. Specifically, there was evidence that Gallimore suffered from a congenital back problem that could perhaps have been aggravated by the accident; given this testimony, it is not improbable that the jury believed that this preexisting condition was responsible for 20% of Gallimore's injuries.

Gallimore, 635 F.2d at 1173-4.

Clearly, the various courts whose opinions are discussed *above* could merely have said "if a FELA defendant's negligence caused any part of the plaintiffs injuries it must pay damages for all of them" had this been the law. But this is not the law. Apportionment of damages among causes is required under the Federal Employers' Liability Act and must be permitted by this court.

NORFOLK AND WESTERN RAILWAY COMPANY,

By /s/ Rodney L. Baker II
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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,

Defendants.

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 10.

CAUSATION BY ONE OTHER THAN RAILROAD

If you find that the plaintiff in this case has a condition or disease which was caused by his employment with employers other than the railroad, plaintiff's recovery must be limited to only such damages as result from his railroad employment and he cannot recover damages which have been or will be caused by his non-railroad employment. This is so because the railroad can be held responsible only for such of a plaintiff's damages as result from its alleged negligence while the plaintiff was employed at the railroad.

Matthews v. Atchison, T. & S. F. Railway Co., 129 P. 2d 435 (Cal. App. 1942)

Holladay v. Chicago, Burlington & Quincy Railroad Co., 255 F. Supp. 879 (S. D. Iowa 1966)

GIVEN _____
REFUSED_____
WITHDRAWN_____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

_____

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,

Defendants.

_____

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 11.

CONTRIBUTORY NEGLIGENCE—
CIGARETTE SMOKING

The Court instructs the Jury that if you find that a Plaintiff have sustained an asbestos-related injury disease, and if you find that the Defendant, Norfolk and Western Railway Company, was negligent and that such negligence contributed in whole or in part, even in the slightest, to cause the Plaintiff's injury or disease, then the Plaintiff can recover only for such injury or disease that you find to have been caused by asbestos. He cannot recover for any aggravation of an asbestos-related injury or disease which you find to have been caused by smoking.

GIVEN _____
REFUSED_____
WITHDRAWN_____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,

Defendants.

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 13.

AGGRAVATION/SMOKING

The Court instructs the Jury that if you find that the Plaintiff has sustained an asbestos-related injury/disease, and if you find that the Defendant, Norfolk and Western Railway Company, was negligent and that such negligence contributed in whole or in part, even in the slightest, to cause the Plaintiff's injury or disease, then the Plaintiff can recover only for such injury or disease that you find to have been caused by asbestos. He cannot recover for any injury or disease caused by smoking. Nor can he recover for any aggravation of an asbestos-related injury or disease which you find to have been caused by smoking.

GIVEN _____
REFUSED_____
WITHDRAWN_____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,

Defendants.

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 14.

PREVIOUS CONDITION; AGGRAVATION

The Court instructs the Jury that if you find that the defendant, Norfolk and Western Railway Company was negligent in exposing the Plaintiff to asbestos, and if you find that the Plaintiff was negligent in smoking cigarettes, and that the negligence of each combined to cause pulmonary injury to the Plaintiff, the Plaintiff is entitled to recover, but you are required to diminish his damages in proportion to the amount of negligence attributable to him.

GIVEN _____
REFUSED_____
WITHDRAWN_____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876

Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,

Defendants.

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 20.

CONTRIBUTORY NEGLIGENCE—
CIGARETTE SMOKING

If you find from a preponderance of the evidence that plaintiff smoked cigarettes and that plaintiff's cigarette smoking caused in whole or in part the injuries of which plaintiff complains, then you may find that the plaintiff was contributorily negligent. If you find that both the railroad and the plaintiff were negligent, and that their respective negligence was a proximate cause of plaintiff's alleged injury, then the plaintiff will not be barred from recovery, but his recovery will be reduced. To determine the amount of the reduction, you must compare the negligent conduct of the railroad and plaintiff in terms of percentages. You will attribute to each of them that percentage that you find describes or measures that party's negligent contribution to the happening of the injury.

Dale v. Baltimore & Ohio R.R. Co., 552 F.2d 1037 (PA 1989).

Zarow-Smith v. New Jersey Transit Rail Operation, Inc., 953 F. Supp. 581, 587-589 (D.N.J. 1997).

GIVEN _____
REFUSED _____
WITHDRAWN _____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876
	Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,
Defendants.

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 21.

NEGLIGENCE

The Court instructs the Jury that if you find that the defendant, Norfolk and Western Railway Company was negligent in exposing the Plaintiff to asbestos, and if you find that the Plaintiff was negligent in smoking cigarettes, and that the negligence of each combined to cause pulmonary injury to the Plaintiff, then the Plaintiff is entitled to recover, but you are required to diminish his damages in proportion to the amount of negligence attributable to him.

GIVEN _____
REFUSED_____
WITHDRAWN_____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

FREEMAN AYERS,	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON,	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER,	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE,	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY,	CIVIL ACTION NO. 92-C-8970
CARL BUTLER,	CIVIL ACTION NO. 93-C-6876
	Plaintiffs,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, et al.,
Defendants.

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S REQUEST FOR CHARGE NO. 30.

FEAR OF CANCER

You are instructed that plaintiffs are not entitled to recover damages for any condition unless plaintiffs have proven by a preponderance of the evidence that it is more likely than not that they have or will develop such condition. Therefore, the court instructs you that you cannot award damages to plaintiffs for cancer or for any increased risk of cancer. Damages for cancer or an increased risk of cancer are not permitted because plaintiffs have not, as a matter of law, proven that they are entitled to such damages.

You have heard a great deal of testimony regarding cancer and increased risk of cancer. This testimony is relevant only to judge the genuineness of plaintiffs' claims of fear of developing cancer. You are not to consider evidence regarding cancer or increased risk of cancer for any other purpose.

Under the Federal Employees Liability Act (F.E.L.A.), plaintiffs are not entitled to recover damages for fear of developing a disease unless you find that plaintiffs have proven by a preponderance of the evidence that each plaintiff has an actual likelihood of developing cancer and that each plaintiff has exhibited physical manifestations caused by the alieged fear of cancer. Under the F.E.L.A., physical manifestations which are sufficient to support a claim for emotional distress in connection with a fear of developing cancer include post traumatic stress disorder, accompanied by sleeplessness, weight loss, and vomiting. You cannot award damages to a plaintiff for fear of cancer unless you find that he has proven by a preponderance of the evidence that he has an actual likelihood of developing cancer and that he has experienced physical manifestations caused by fear of developing cancer.

Marchica v. Long Island Railroad Co., 31 F.3d 1197, 1202 (2nd Cir. 1994)

Consolidated Rail Corp. v. Gottshall, __ U.S. __, 114 S.Ct. 2396 (1994).

Metro-North Commuter R.R. Co. v. Buckley, 117 S.Ct. 2113, 2118 (1997).

Doner v. Adams Contracting Inc., 617 N.Y.S. 2d 565, 566 (A.D. 3 Dep't 1994).

GIVEN _____
REFUSED_____
WITHDRAWN_____
OBJECTED TO _____

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CIVIL ACTION NO. 93-C-6857

FREEMAN AYERS,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, *et al.*,

Defendants.

QUESTIONS AND JURY VERDICT

1. Was the Norfolk and Western Railway Company negligent in one or more of the particulars alleged?

YES____ NO____

If your answer to this question is "No," you will return a verdict for the defendant, and answer no further questions. Date and sign form and return to Court Room. However, if your answer was "Yes," then answer question 2.

2. Did the negligence of the Norfolk and Western Railway Company cause or contribute to a breathing condition in the plaintiff?

YES____ NO____

If your answer to this is "No," you will return a verdict for defendant and answer no further questions. Date and sign form and return to Court Room. However, if your answer is "Yes," proceed to question 3.

3. Was the plaintiff, by smoking or in any other way, guilty of some contributory negligence or fault which contributed to this breathing condition?

YES____ NO____

4. Was the plaintiff's breathing condition caused in whole or in part by any other factors including his employment with employers other than the Norfolk and Western Railway Company?

YES____ NO____

5. If your answer to question 3 or 4 is "Yes," what percentage of responsibility should be attributed to each of the following factors?

Express your determination in percentages.

A. Plaintiff's cigarette smoking	_____%
B. Defendant Norfolk and Western Railway Company	_____%
C. Other Employment	_____%
TOTAL	100%

6. What amount would fairly compensate plaintiff for his breathing condition and damages?_____

Date April___,1998.

_____
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

_____

CIVIL ACTION NO. 93-C-6876

_____

CARL RICHARD BUTLER,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, *et al.*,
Defendants.

_____

QUESTIONS AND JURY VERDICT

1. Was the Norfolk and Western Railway Company negligent in one or more of the particulars alleged?

YES____ NO____

If your answer to this question is "No," you will return a verdict for the defendant, and answer no further questions. Date and sign form and return to Court Room. However, if your answer was "Yes," then answer question 2.

2. Did the negligence of the Norfolk and Western Railway Company cause or contribute to a breathing condition in the plaintiff?

YES____ NO____

If your answer to this is "No," you will return a verdict for defendant and answer no further questions. Date and sign form and return to Court Room. However, if your answer is "Yes," proceed to question 3.

3. Was the plaintiff, by smoking or in any other way, guilty of some contributory negligence or fault which contributed to this breathing condition?

YES____ NO____

4. Was the plaintiff's breathing condition caused in whole or in part by any other factors including his employment with employers other than the Norfolk and Western Railway Company?

YES____ NO____

5. If your answer to question 3 or 4 is "Yes," what percentage of responsibility should be attributed to each of the following factors?

A. Plaintiff's cigarette smoking	_____%
B. Defendant Norfolk and Western Railway Company	_____%
C. Other Employment	_____%
TOTAL	100%

6. What amount would fairly compensate plaintiff for his breathing condition and damages?_____

Date April___,1998.

_____
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

_____

CIVIL ACTION NO. 92-C-8888

_____

DOYLE JOHNSON,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, *et al.*,
Defendants.

_____

QUESTIONS AND JURY VERDICT

1. Was the Norfolk and Western Railway Company negligent in one or more of the particulars alleged?

YES____ NO____

If your answer to this question is "No," you will return a verdict for the defendant, and answer no further questions. Date and sign form and return to Court Room. However, if your answer was "Yes," then answer question 2.

2. Did the negligence of the Norfolk and Western Railway Company cause or contribute to a breathing condition in the plaintiff?

YES____ NO____

If your answer to this is "No," you will return a verdict for defendant and answer no further questions. Date and sign form and return to Court Room. However, if your answer is "Yes," proceed to question 3.

3. Was the plaintiff, by smoking or in any other way, guilty of some contributory negligence or fault which contributed to this breathing condition?

YES____ NO____

4. Was the plaintiff's breathing condition caused in whole or in part by any other factors including his employment with employers other than the Norfolk and Western Railway Company?

YES____ NO____

5. If your answer to question 3 or 4 is "Yes," what percentage of responsibility should be attributed to each of the following factors?

A. Plaintiff's cigarette smoking	_____%
B. Defendant Norfolk and Western Railway Company	_____%
C. Other Employment	_____%
TOTAL	100%

6. What amount would fairly compensate plaintiff for his breathing condition and damages?_____

Date April___,1998.

_____
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

_____

CIVIL ACTION NO. 92-C-8970

_____

JOHN T. SHIRLEY,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, *et al.*,
Defendants.

_____

QUESTIONS AND JURY VERDICT

1. Was the Norfolk and Western Railway Company negligent in one or more of the particulars alleged?

YES____ NO____

If your answer to this question is "No," you will return a verdict for the defendant, and answer no further questions. Date and sign form and return to Court Room. However, if your answer was "Yes," then answer question 2.

2. Did the negligence of the Norfolk and Western Railway Company cause or contribute to a breathing condition in the plaintiff?

YES____ NO____

If your answer to this is "No," you will return a verdict for defendant and answer no further questions. Date and sign form and return to Court Room. However, if your answer is "Yes," proceed to question 3.

3. Was the plaintiff, by smoking or in any other way, guilty of some contributory negligence or fault which contributed to this breathing condition?

YES____ NO____

4. Was the plaintiff's breathing condition caused in whole or in part by any other factors including his employment with employers other than the Norfolk and Western Railway Company?

YES____ NO____

5. If your answer to question 3 or 4 is "Yes," what percentage of responsibility should be attributed to each of the following factors?

A. Plaintiff's cigarette smoking	_____%
B. Defendant Norfolk and Western Railway Company	_____%
C. Other Employment	_____%
TOTAL	100%

6. What amount would fairly compensate plaintiff for his breathing condition and damages?_____

Date April___,1998.

_____
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

_____

CIVIL ACTION NO. 93-C-7004

_____

JAMES MCCOY SPANGLER,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation, *et al.*,
Defendants.

_____

QUESTIONS AND JURY VERDICT

1. Was the Norfolk and Western Railway Company negligent in one or more of the particulars alleged?

YES____ NO____

If your answer to this question is "No," you will return a verdict for the defendant, and answer no further questions. Date and sign form and return to Court Room. However, if your answer was "Yes," then answer question 2.

2. Did the negligence of the Norfolk and Western Railway Company cause or contribute to a breathing condition in the plaintiff?

YES____ NO____

If your answer to this is "No," you will return a verdict for defendant and answer no further questions. Date and sign form and return to Court Room. However, if your answer is "Yes," proceed to question 3.

3. Was the plaintiff, by smoking or in any other way, guilty of some contributory negligence or fault which contributed to this breathing condition?

YES____ NO____

4. Was the plaintiff's breathing condition caused in whole or in part by any other factors including his employment with employers other than the Norfolk and Western Railway Company?

YES____ NO____

5. If your answer to question 3 or 4 is "Yes," what percentage of responsibility should be attributed to each of the following factors?

A. Plaintiff's cigarette smoking	_____%
B. Defendant Norfolk and Western Railway Company	_____%
C. Other Employment	_____%
TOTAL	100%

6. What amount would fairly compensate plaintiff for his breathing condition and damages?_____

Date April___,1998.

_____
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

_____

CIVIL ACTION NO. 92-C-5829

_____

CLIFFORD VANCE,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY a corporation, *et al.*,

Defendants.

_____

QUESTIONS AND JURY VERDICT

1. Was the Norfolk and Western Railway Company negligent in one or more of the particulars alleged?

YES____ NO____

If your answer to this question is "No," you will return a verdict for the defendant, and answer no further questions. Date and sign form and return to Court Room. However, if your answer was "Yes," then answer question 2.

2. Did the negligence of the Norfolk and Western Railway Company cause or contribute to a breathing condition in the plaintiff?

YES____ NO____

If your answer to this is "No," you will return a verdict for defendant and answer no further questions. Date and sign form and return to Court Room. However, if your answer is "Yes," proceed to question 3.

3. Was the plaintiff, by smoking or in any other way, guilty of some contributory negligence or fault which contributed to this breathing condition?

YES____ NO____

4. Was the plaintiff's breathing condition caused in whole or in part by any other factors including his employment with employers other than the Norfolk and Western Railway Company?

YES____ NO____

5. If your answer to question 3 or 4 is "Yes," what percentage of responsibility should be attributed to each of the following factors?

Express your determination in percentages.

A. Plaintiff's cigarette smoking	_____%
B. Defendant Norfolk and Western Railway Company	_____%
C. Other Employment	_____%
TOTAL	100%

6. What amount would fairly compensate plaintiff for his breathing condition and damages?_____

Date April__,1998.

_____
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

_____

FREEMAN AYERS,
DOYLE JOHNSON,
JAMES SPANGLER,
CLIFFORD VANCE,
JOHN SHIRLEY,
CARL BUTLER,

Plaintiffs,

vs. Civil Action No. 93-C-6857
92-C-8979
93-C-6876
92-C-8970
93-C-7004
92-C-5829

NORFOLK AND WESTERN RAILWAY COMPANY
a corporation,

Defendant.

_____

TRIAL TRANSCRIPT
April 27, 1998

* * * *

JURY INSTRUCTIONS

[15] First, counsel, the parties and I want to thank you for your patience and attention throughout this case, your care in the consideration of the evidence and patience during recesses and delays.

These instructions are given to you to explain the law as it relates to: (1) the rules which you must follow in your deliberations and in weighing and considering the evidence,

and (2) the law governing the claims of the plaintiffs and the defense of the defendant.

As you may know, my role and yours are quite different. It is my duty as a Judge essentially to act as a referee during the trial and to instruct you about the law which applies to this case. It is your duty to decide the facts and, in deciding these facts, to comply with the rules of law and apply the rules of law as I state them to you. If you disagree with the law that I explain to you, you must nevertheless apply that law because you have taken an oath to respect the law.

[4] [sic] In your review of the evidence and in reaching a decision, you should not be influenced by sympathy, prejudice or public sentiment.

As you consider these instructions, you should not single out one instruction or a part of an instruction and ignore the remainder. Instead, you must consider all of these instructions as a whole and view each instruction in light of all of the others. Also, don't be influenced by the order in which the instructions are presented or by the manner in which I read them to you.

THE JURY'S DUTY

You are the only judges of the facts in this case. In other words, it is your responsibility to decide what the true facts are from all of the evidence which you have seen and heard.

Nothing which I may have said or done during this trial should be considered by you as an indication that I believe or disbelieve certain facts or witnesses. You should disregard any expression or action by me which would seem to indicate any opinion that I have on the facts.

The only evidence that you may consider are [5] the sworn statements of the witnesses, the exhibits that have been received in evidence and any facts stipulated by counsel.

You should consider all of the evidence whether it has been referred to by me or by the lawyers. As I have told you, the statements of counsel are not evidence unless all of the lawyers stipulate or agree that a fact is true. When the lawyers stipulate a fact, you may accept that fact as true without the testimony of a witness or any exhibits.

In determining whether any fact has been proved in this case you may, unless I tell you otherwise, consider the testimony of all witnesses, no matter who called them and all exhibits received in evidence, regardless of who may have produced them.

Generally, there are two types of evidence from which you may properly find the truth in a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence which is the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. The law makes no distinction between direct and circumstantial evidence, but simply requires that you [6] find the facts in accordance with all of the evidence in this case, both direct and circumstantial.

You are to consider only the evidence presented and you may not guess or speculate as to the existence of any facts in this case. But, you may draw from the facts which you find have been proved, such reasonable inferences as seem justified in light of your own experience.

At times though out the trial, I have been called upon to pass on the admissibility of certain evidence which was offered. Don't be concerned with my rulings or the reasons for them because, whether evidence is admissible or not is a legal question. If I admit evidence to which an objection has been made, I do not determine what weight should be given to such evidence because that is your responsibility. If an objection was sustained, don't guess what the answer might have been or why the question was asked.

CREDIBILITY OF WITNESSES

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of the evidence. As used in these instructions, the "credibility" of a witness means the truthfulness or [7] believability of a witness. The "weight of the evidence" means the extent to which you are or are not convinced by the evidence. The number of witnesses testifying on one side or the other of an issue is not alone the test of the credibility of a witness or the weight of the evidence. If warranted, you may believe a single witness as against a number of witnesses who testify differently. The proper tests are how truthful was the witness and how convincing was his or her testimony in light of all of the evidence and circumstances shown.

In deciding whether the statements of a witness are truthful and convincing or not, you should carefully examine the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive and state of mind and his or her behavior and appearance while on the witness stand. You should also consider any relation each witness may have to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which each witness is either supported or [8] contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause the jury to disbelieve such testimony. Two or more persons who witness an incident may see or hear it differently, and innocent misrecollection, like failure of recollection, is not uncommon. Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses should be considered by you, but, in weighting their effect, you should consider whether they

pertain to a matter of importance or to an unimportant detail, and whether they result from an innocent error or a willful falsehood.

A witness may be discredited or impeached, not only by contradictory evidence, but also by evidence that at other times the witness has made statements which are inconsistent with the present testimony of the witness. If you believe that any witness has made statements at other times which are inconsistent with the testimony given in this trial, then you should also consider whether the inconsistency results from an innocent error or from a willful falsehood and whether [9] it pertains to a matter of importance or an unimportant detail.

After you have considered all of the factors bearing upon the credibility of a witness which I have mentioned, you may decide to believe all of the testimony of a particular witness, or you may accept or disregard any part of the testimony of a particular witness. In other words, you may give the testimony of any witness such credibility and weight, as you may think it deserves.

In considering a verdict you should take into consideration the fact that not all persons live to the age of expectancy for reasons unrelated to the injuries alleged in this case and other persons live beyond their normal life expectancy. The life expectancy tables that have been admitted in evidence are based on averages and are only an aid for you in your deliberations together with all of the other evidence in the case.

EXPERT WITNESSES

The rules of evidence ordinarily do not permit witnesses to testify opinions or conclusions. An exception to this rule exists as to persons referred to as "expert witnesses". These are witnesses who, by virtue [10] of education or experience, have become more knowledgeable on a certain subject than the average person.

Witnesses who are recognized as experts may state their opinions about relevant matters and may give their reasons for the opinions. You should consider any expert opinions given in this case and give to such opinions such weight as you believe they deserve. In determining the weight to be given to the opinion of an expert you should consider the education, training and experience of the expert, the basis for the opinion, the reasons given by the witness and the opinions of other similar witnesses on the same matters as well as the rules generally applicable to all witnesses in this case.

BURDEN OF PROOF

In order to recover damages, the plaintiff(s) must prove every element of their individual claims by a preponderance of the evidence. By a preponderance of the evidence means by the greater weight of the evidence. A fact is proved by a preponderance (or by the greater weight of the evidence) if you, the jurors, believe that it is more likely true than not true. The [11] burden is also upon the defendant to prove by a preponderance of the evidence that the plaintiffs or any of them were negligent and that their negligence proximately contributed to their injuries.

CLAIMS AND DEFENSES

Although in this trial you have heard evidence concerning the claims of several plaintiffs, you must weigh the evidence you have heard concerning each plaintiff's claim individually. Therefore, you must listen to and apply each of the following instructions of law to each plaintiff's case individually. As you listen to these instructions, bear in mind that each instruction relates to each plaintiff's claim individually, and were therefore written to apply to each plaintiff individually.

The mere fact that a plaintiff brings a suit for damages in this Court in and of itself does not in any degree establish a right to such damages. The mere fact of initiating a suit at law

is not to be considered by you as establishing the right of a plaintiff to recover.

The mere fact that the plaintiff may have been exposed to some substance at work and that he may have contracted a condition or disease that results from such [12] exposure does not in and of itself and, without more, make the railroad liable to the plaintiff or raise any presumption of negligence on the part of the defendant railroad.

Claims for job related injuries made by employees of railroad companies which are engaged in interstate commerce are governed by Federal law, specifically the Federal Employers' Liability Act. This law is commonly referred to as "[FELA]" and this shorthand reference will be used for convenience in these instructions.

The defendant, Norfolk and Western Railway Company, is the successor-in-interest and is responsible for the acts and omissions, if any, of the Virginian Railroad. Any reference in these instructions to Norfolk and Western, N&W or the railroad should be understood to include the Virginian Railroad.

The defendant in this case, Norfolk and Western Railway Company, is a corporation and can act only by its agents or servants. Therefore whenever mention is made of defendant doing or not doing something, it means that the defendant was acting through its agents or servants within the scope of their [13] employment.

Section 51 of the Federal Employers' Liability Act (45 U.S.C. § [51]), the law under which the plaintiff has brought this lawsuit, provides in part that:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for

injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

It is agreed that, at the times and places alleged in the complaint, defendant N&W was a common carrier by railroad, engaged in interstate commerce; that each plaintiff was then an employee of defendant N&W, engaged in such commerce; and that the plaintiff's right, if any, to recover in this case is governed by the provisions of the Federal Employers' Liability Act.

Therefore, in order to recover damages under the [FELA], the plaintiffs must prove by a [14] preponderance of the evidence that the N&W was negligent and that the negligence proximately caused injuries to them. Under the terms of the Federal Employers' Liability Act, if you find by a preponderance of the evidence that the railroad company was guilty of any negligence whatsoever, and you further find from a preponderance of the evidence that such negligence contributed, however slightly, to the injury of the plaintiff, then your verdict must be in favor of the plaintiff and against the defendant railroad. There may be more than one cause to any injury. However, a plaintiff may recover from the defendant if it is established that negligence on the part of the defendant was a cause of the injury. For the purposes of this action, injury or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part in bringing about or actually causing the injury or damage.

Under [FELA], the employer is not held to an absolute responsibility for the safe condition of the workplace, but only to the duty of exercising reasonable care to that end, the

degree of care being [15] commensurate with the danger reasonably to be anticipated.

Negligence is defined as the failure to do what a reasonably careful person would have done under the same or like circumstances, or the doing of something which a reasonably careful person would not have done under the same or like circumstances. In other words, negligence is the failure to exercise reasonable and ordinary care. Specifically, it was the duty of N&W to protect its employees from those hazards at the workplace that it knew or had reason to know of. This duty included the obligation to warn the employees, to provide protective devices and to take other reasonable steps to eliminate the possibility that its employees would be injured by the hazards that it knew or had reason to know of.

In determining whether the defendant railroad knew or should have known that exposure to some substance would result in injury to the plaintiff, you may look to the evidence in this case bearing upon what has been referred to as the state of the art. The term "state of the art," as used in this case, means that knowledge that was reasonably available at any [16] particular period of time concerning the dangers presented by exposure to asbestos or asbestos containing products or silica or silica containing products.

The defendant railroad was not required to have known everything that is written in the medical or scientific journals. The defendant railroad was under the duty to take reasonable steps to know about available medical and scientific literature to determine the nature and effects of the substances to which its employees were exposed. The law presumes that a person, including a corporation, knows that which, by the use of ordinary care, he could have seen or known had he looked.

Under [FELA] it was the continuing and nondelegable duty of the Norfolk and Western Railway Company and Virginian Railroad to furnish plaintiff with a reasonably safe place in

which to work. By nondelegable, I mean that the railroads could not depend on a third party to satisfy their duty to furnish a reasonable safe place to work.

Some of the plaintiffs may have had exposure to asbestos at places other than those related to their employment with the Virginian and Norfolk and Western [17] Railroad. If you find that the Railroad was negligent and dust exposures at the Railroad contributed, however slightly, to the plaintiff's injuries, you are not to make a deduction for the contribution of non-railroad exposures. The Court will make any deductions which may be appropriate to make.

Section 53 of [FELA] provides:

> In all actions brought against any such common carrier by railroad . . . to recover damages for personal injuries to an employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished . . . in proportion to the amount of negligence attributable to such employee . . .

Under this section, it was the continuing duty of the plaintiff to exercise reasonable and ordinary care for his own safety and protection. The defendant contends that the injuries sustained by the plaintiffs were caused in whole or in part by cigarette smoking. In addition, the defendant maintains that it was negligence for the plaintiffs to smoke cigarettes and that this was contributory negligence. If a plaintiff knew or had reason to know that smoking cigarettes caused permanent and debilitating lung disease it was negligent to smoke [18] cigarettes or to fail to take reasonable steps to quit smoking when he learned or could have learned of the hazards of smoking.

If you find from a preponderance of the evidence that a plaintiff was negligent and that plaintiff's cigarette smoking caused, in whole or in part, the plaintiff's lung impairment or

injury, then you may find that the plaintiff was contributorily negligent. If you find that both the railroad and the plaintiff were negligent, and that their respective negligence was a proximate cause of plaintiff's alleged injury, then the plaintiff will not be barred from recovery, but his recovery will be reduced. To determine the amount of the reduction, you must compare the negligent conduct of the railroad and plaintiff in terms of percentages. You will attribute to each of them that percentage that you find describes or measures that party's negligent contribution to the happening of the injury.

In a [FELA] case, assumption of the risk is not a defense available to an employer. So, the fact that an employee may have known or could have known of an unsafe condition at his workplace which resulted in [19] injuries to him does not mean that the employee was contributorily negligent.

In addition to [FELA], some of the plaintiffs have based a claim on another Federal law called the Boiler Inspection Act or "BIA". That Act provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril of life or limb. . . .

As interpreted under the Boiler Inspection Act,

> "Unnecessary", means that which is not required by the usual circumstances. "Peril", means an exposure to injury or destruction. "Unnecessary peril", as used in the Act means an exposure to injury or destruction which is not required by the usual circumstances of the particular duty the employee is to perform, but which is an exposure to injury over and above that which is usually,

ordinarily or necessarily incidental to the performance of the particular duty.

Under this Act, If you find that the locomotives of the [20] Railroad were not in proper condition and safe to operate in service without unnecessary peril of life or limb to the plaintiffs, then the railroad is absolutely liable for the injuries to the plaintiffs without any regard for or consideration of contributing fault on the part of the plaintiffs.

Before the N&W may be found liable under the Locomotive Boiler Inspection Act, plaintiffs must prove, by a preponderance of the credible evidence, that their injuries, if any, directly resulted from work upon a locomotive or locomotives which were actually in "road service". Locomotives being serviced in a place of repair are not in "road service". Therefore, if you find that plaintiffs injuries, if any, resulted from inspection, repair or servicing of railroad equipment located at a maintenance facility, the defendant railroad cannot be found liable under the Locomotive Boiler Inspection Act. Additionally, the Boiler Inspection Act does not apply where the operation is that of switching, classifying, checking, or assembling cars within railroad yards for the purpose of making up trains.

If you find that the only injury sustained by [21] a plaintiff is from cigarette smoking rather from exposure to dangerous substances at the workplace, then the defendant railroad is not liable to that plaintiff under the Boiler Inspection Act.

DAMAGES

The Court instructs the jury that the fact that instructions are given you on the subject of damages should not be taken by you as an intimation on the part of the Court that the defendant is or is not liable for the alleged injury and damages complained of.

If you find that the defendant is liable to a plaintiff, you must then decide what amount of damages which you believe will fairly and adequately compensate the plaintiff for his injuries.

Each plaintiff who you have found to have been injured as a result of the fault of the defendant is entitled to recover for injury or impairment and physical and mental pain and suffering in the past; any injury and impairment and physical and mental pain and suffering that may reasonably be expected to occur in the future; any loss of enjoyment of the normal pleasures of life; and any medical expenses that may be reasonably expected to be incurred in the future.

[22] You have heard a great deal of testimony regarding cancer and increased risk of cancer. This testimony is relevant only to judge the genuineness of plaintiffs' claims of fear of developing cancer. As an integral part of damages for mental pain and suffering, any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering. On the other hand none of the plaintiffs have offered evidence that he actually has cancer or that he will, with reasonable certainty develop cancer in the future. Therefore, you cannot award damages to plaintiffs for cancer or for any increased risk of cancer.

In awarding damages, you should not reduce the amount of damages because you may have found a plaintiff contributorily negligent. Any reduction of damages based on the negligence of the plaintiffs will be done by the Court except, if you find that a plaintiff has a reasonable fear of cancer and if you find that the fear was caused, in part, by cigarette smoking, then you may reduce your award for damages for fear of cancer only in [23] an amount that you deem appropriate.

If any award is made to a plaintiff as damages in this case, the award is not subject to federal or state income taxes, and you should not consider such taxes in fixing the amount of any award made to a plaintiff.

DELIBERATIONS AND VERDICT

Following the arguments of counsel, this case will be given to you for decision. Your first responsibility is to select a foreperson—one of your members who will preside over your deliberations and act as your spokesperson. Following this selection, you should carefully review the testimony and the evidence in order to decide the matters in dispute between the parties.

In order to reach a final verdict, your decision must be unanimous. It must likewise represent the considered judgment of each juror. So, it is your duty to consult with one another and to deliberate with a view to reaching an agreement.

If, after a fair and impartial review of the evidence and after hearing and giving due consideration to the opinions of your fellow jurors, you can reach a [24] verdict which each of you individually and all of you as a jury believe is consistent with the law and the evidence, it is your duty to return such a verdict.

If, during your deliberations you should have a question, please write your question on a paper provided and give it to the bailiff. When you have reached a verdict, the Foreman should endorse your verdict on the appropriate forms and you should then tell the bailiff that you have completed your work and have reached a verdict. Counsel, the parties and I will then gather to receive your decision.

TRIAL TRANSCRIPT
April 27, 1988

Plaintiff's closing argument

* * * *

[45] And that you begin a cell turnover rate that can be a predecessor to cancer, even with that, and then from a human epidemiology standpoint we know that even nonoccupational, nonjob exposures such as family members whose only exposure is to a relatives clothes in the household or something like that, have developed asbestos disease, particularly mesothelioma.

So, just keep that in mind as you hear the evidence on exposure, and I'll have Mr. Boiter talk to you about that now. Thank you.

* * * *

* * * *

[94] So what I want to do now, I'm running out of time, is talk briefly about each individual. You've got the issue for each one of them, of the physical damage up to a third of the lung already compromised, you've got the physical suffering of shortness of breath, and you've got the mental suffering of knowing—living with this and living with the cancer risk, and the evidence about cancer was just introduced just solely for the issue of mental suffering, because we don't and we cannot prove for such which—the table—the risk factor tables would indicate of these six men probably that at least one or two is going to die of cancer, yet, we cannot prove which one.

So you cannot—you cannot compensate them [95] for cancer but you can compensate them for the mental knowledge, and the best way I know how to put it is, and I don't mean to be overly dramatic, but looking around at each other and thinking, who's it going to be? That's part of their mental suffering.

* * * *

[114] So at this point I'm going to let him talk to you about the medical aspect of the cases and then I'll come back and finish; and hopefully, we won't take too long to do this. But again, there are six cases and it will take a little bit of time to go through them

MR. BAKER: Good afternoon, Ladies and Gentleman, it's a pleasure to speak to you again today.

Mr. Adkins, has already discussed with you the essential elements of negligence and causation, the elements that must be proven under the Federal Employer's Liability Act before the N & W can be responsible for any injury.

I'm going to discuss in detail, causation. The simple question for you to answer did exposure to anything at the N & W negligently cause an injury in the plaintiffs.

We've heard over the last couple of weeks the word cancer more than I've heard in the last ten years or so. It's important for you to keep in mind what the Judge instructed you, and that is, that cancer is not a part of this case. None of these plaintiffs have cancer, none of these plaintiffs have what's termed as increase risk of cancer that's compensable.

[115] The cancer evidence was admitted with the ____ of genuine with the fear of cancer claim. When you judge mental anxiety associated with the fear of developing a condition, one thing that you can look for to judge how severe that condition: are there any physical manifestations? I don't think you've heard any testimony in these cases of any plaintiff having any physical manifestation of worry.

Now, I'm sure you all are a representative sample of society at one time or another in your life you've been depressed, you've been anxious about something. There are things that happen—maybe, post traumatic stress disorder is an extreme example, sleeplessness, weight loss, nausea, vomiting. We didn't have any testimony about anything along those lines in any of these cases.

But the plaintiffs did testify that they were concerned about their health and they were concerned that they would happen to them and they would pass on and leave behind their families.

* * * *

[158] Mr. Vance is one of those lucky people that hasn't yet developed a breathing condition in relation to his smoking. Now, that doesn't mean that Mr. Vance's high blood pressure may not have been affected by smoking, or that he may have had other problems associated with his smoking. Because you all know that smoking doesn't cause a single type of problem. It's widely known that it affects a lot of systems of our body.

* * * *

[196] Now, what did he tell you about his shortness-of-breath for the past five to seven years. Put a value on that. What's he going through now with his symptoms? With the cancer risk you've heard about, the worry about that.

* * * *

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FREEMAN AYERS,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, etc.

VERDICT FORM—AYERS

1. Was Norfolk and Western negligent in violation of the Federal Employer's Liability Act?

YES √ NO __

(If your answer to this question is "No", then you do not have to answer any further questions. Your Foreperson should sign this form and you should inform the bailiff that you have completed your work. If your answer is "Yes", proceed to answer question No. 2.)

2. Did the negligence of the Norfolk and Western Railway cause or contribute to any lung injury or pulmonary impairment of the plaintiff Freeman Ayers?

YES √ NO __

(If your answer to this question is "No", then you do not have to answer any further questions. Your Foreperson should sign this form and you should inform the bailiff that you have completed your work. If your answer is "Yes", proceed to answer question No. 3.)

3. Was the plaintiff, by smoking cigarettes, guilty of negligence that caused or contributed to his injury or impairment?

YES √ NO __

(If your answer to this question is "No", skip question No. 4 and proceed to answer question No. 5. If your answer is "Yes", proceed to answer question No. 4.)

4. What percentage of negligence do you attribute to each of the parties?

a. Norfolk and Western	69%
b. Freeman Ayers	31%
TOTAL	100%

5. What amount do you find will reasonably compensate the plaintiff, Freeman Ayers, for 100% of the loss he has suffered and may suffer in the future because of his lung injury. (Do not reduce because of any contributory negligence that you may have found in question No. 4.)

$913,860.00

4/29/1998
Date

/s/ George P. McKiney
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

CARL BUTLER,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, etc.

VERDICT FORM—BUTLER

1. Was Norfolk and Western negligent in violation of the Federal Employer's Liability Act?

YES √ NO __

(If your answer to this question is "No", then you do not have to answer any further questions. Your Foreperson should sign this form and you should inform the bailiff that you have completed your work. If your answer is "Yes", proceed to answer question No. 2.)

2. Did the negligence of the Norfolk and Western Railway cause or contribute to any lung injury or pulmonary impairment of the plaintiff Carl Butler?

YES √ NO __

(If your answer to this question is "No", then you do not have to answer any further questions. Your Foreperson should sign this form and you should inform the bailiff that you have completed your work. If your answer is "Yes", proceed to answer question No. 3.)

3. What amount do you find will reasonably compensate the plaintiff, Carl Butler, for the loss he has suffered and may suffer in the future because of his lung injury.

$1,047,000.00

4/29/1998
Date

/s/ George P. McKiney
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DOYLE JOHNSON,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, etc.

VERDICT FORM—JOHNSON

1. Was Norfolk and Western negligent in violation of the Federal Employer's Liability Act?

YES √ NO __

(If your answer to this question is "No", then you should proceed to answer question No. 5 and 6. If your answer is "Yes", proceed to answer question No. 2.)

2. Did the negligence of the Norfolk and Western Railway cause or contribute to any lung injury or pulmonary impairment of the plaintiff Doyle Johnson?

YES √ NO __

(If your answer to this question is "No", then then you should proceed to answer question No. 5 and 6. If your answer is "Yes", proceed to answer question No. 3.)

3. Was the plaintiff, by smoking cigarettes, guilty of negligence that caused or contributed to his injury or impairment?

YES √ NO __

(If your answer to this question is "No", skip question No. 4 and proceed to answer question No. 5. If your answer is "Yes", proceed to answer question No. 4.)

4. What percentage of negligence do you attribute to each of the parties?

a. Norfolk and Western	86%
b. Doyle Johnson	14%
TOTAL	100%

5. What amount do you find will reasonably compensate the plaintiff, Doyle Johnson, for 100% of the loss he has suffered and may suffer in the future because of his lung injury. (Do not reduce because of any contributory negligence that you may have found in question No. 4.)

$1,230,806.00

6. Did Norfolk and Western violate the Boiler Inspection Act in a manner that caused injury to the plaintiff, Doyle Johnson?

YES __ NO √

4/29/1998
Date

/s/ George P. McKiney
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JOHN SHIRLEY,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, etc.

VERDICT FORM—SHIRLEY

1. Was Norfolk and Western negligent in violation of the Federal Employer's Liability Act?

YES √ NO __

(If your answer to this question is "No", then you should proceed to answer questions No. 3 and 4. If your answer is "Yes", proceed to answer question No. 2.)

2. Did the negligence of the Norfolk and Western Railway cause or contribute to any lung injury or pulmonary impairment of the plaintiff John Shirley?

YES √ NO __

(If your answer to this question is "No", then you should proceed to answer questions No. 3 and 4. If your answer is "Yes", proceed to answer question No. 3.)

3. What amount do you find will reasonably compensate the plaintiff, John Shirley, for the loss he has suffered and may suffer in the future because of his lung injury.

$979,800.00

4. Did Norfolk and Western violate the Boiler Inspection Act in a manner that caused injury to the plaintiff, John Shirley?

YES __ NO √

4/29/1998
Date

/s/ George P. McKiney
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JAMES SPANGLER,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, etc.

VERDICT FORM—JAMES SPANGLER

1. Was Norfolk and Western negligent in violation of the Federal Employer's Liability Act?

YES √ NO __

(If your answer to this question is "No", then you do not have to answer any further questions. Your Foreperson should sign this form and you should inform the bailiff that you have completed your work. If your answer is "Yes", proceed to answer question No. 2.)

2. Did the negligence of the Norfolk and Western Railway cause or contribute to any lung injury or pulmonary impairment of the plaintiff James Spangler?

YES √ NO __

(If your answer to this question is "No", then you do not have to answer any further questions. Your Foreperson should sign this form and you should inform the bailiff that you have completed your work. If your answer is "Yes", proceed to answer question No. 3.)

3. Was the plaintiff, by smoking cigarettes, guilty of negligence that caused or contributed to his injury or impairment?

YES √ NO __

(If your answer to this question is "No", skip question No. 4 and proceed to answer question No. 5. If your answer is "Yes", proceed to answer question No. 4.)

4. What percentage of negligence do you attribute to each of the parties?

a. Norfolk and Western	63%
b. James Spangler	37%
TOTAL	100%

5. What amount do you find will reasonably compensate the plaintiff, James Spangler, for 100% of the loss he has suffered and may suffer in the future because of his lung injury. (Do not reduce because of any contributory negligence that you may have found in question No. 4.)

$868,500.00

4/29/1998
Date

/s/ George P. McKiney
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

CLIFFORD VANCE,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, etc.

VERDICT FORM—VANCE

1. Was Norfolk and Western negligent in violation of the Federal Employer's Liability Act?

YES √ NO __

(If your answer to this question is "No", then you should proceed to answer questions No. 3 and 4. If your answer is "Yes", proceed to answer question No. 2.)

2. Did the negligence of the Norfolk and Western Railway cause or contribute to any lung injury or pulmonary impairment of the plaintiff, Clifford Vance?

YES √ NO __

(If your answer to this question is "No", then you should proceed to answer questions No. 3 and 4. If your answer is "Yes", proceed to answer question No. 3.)

3. What amount do you fiend will reasonably compensate the plaintiff, Clifford Vance, for the loss he has suffered and may suffer in the future because of his lung injury.

$770,640.00

4. Did Norfolk and Western violate the Boiler Inspection Act in a manner that caused injury to the plaintiff, Clifford Vance?

YES __ NO √

4/29/1998
Date

/s/ George P. McKiney
Foreperson

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Jan 6, 1999]

CIVIL ACTION NO. 93-C-6857

FREEMAN RAY AYERS,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
A Virginia Corporation
Defendant.

JUDGMENT ORDER

On the 19th day of October 1998 came the parties by counsel for purposes of hearing the Plaintiff's Motion for Entry of Judgment. After reviewing the briefs of the parties and hearing the oral arguments regarding same, the Court finds as follows:

1. Following trial in the above-referenced matter, the jury awarded the Plaintiff $913,860.00 in damages. The jury also found the Plaintiff to be 31% at fault for his lung damage.

2. Prior to the trial of this case, the Plaintiff had brought suit for his lung injuries against various manufacturers of asbestos and asbestos containing products. Also prior to the trial of this case, the Plaintiff and his wife settled their claims against some of the defendants. The settlements included compensation for personal injury, punitive damages and loss of consortium claims on behalf of the spouse. The settlements totaled $13,903.06.

3. The Plaintiff has additional settlements that are contingent in nature and are not guaranteed payments. These total $11,644.00.

4. The Court finds that the settlements should be offset from the verdict. However, the issue is whether the entire amount of the settlements should be offset against the verdict. The Court finds that the damages available in an action brought under the Federal Employees' Liability Act (hereinafter "FELA") are different than in a regular civil suit, in this case a products liability type action, governed by West Virginia law. The Court finds that the Plaintiff would be entitled to punitive and his spouse would be entitled to loss of consortium damages in a regular civil suit governed by West Virginia law. However, the Plaintiff would not be entitled to those same damages in a FELA action.

Therefore, the Court finds that the settlements obtained by the Plaintiff against Defendants in nonFELA cases, as listed above, would include punitive and loss of consortium damages. The Court further finds that the settlements must be offset against the verdict but the Plaintiff should get credit for the punitive and loss of consortium damages which are part of said settlements.

The settlements in question are lump sum settlements with no indication of which portion of the payment is for compensatory, loss of consortium or punitive damages. Therefore, the Court finds, based upon its own experience with civil cases in Kanawha County, that a reasonable credit for the Plaintiff would be for ten percent of the settlements to constitute damages for loss of consortium and fifteen percent to constitute punitive damages. It is therefore ORDERED that twenty five percent of the Plaintiff's settlements shall be credited to the Plaintiff and that seventy five percent of the settlements should be deducted from the verdict.

5. The next issue concerns contingent settlements. The Court finds that the Plaintiff has settlements which are unrealized and contingent in nature. The Court further finds that it would be unfair to allow an offset against the verdict for settlements which are contingent in nature. Therefore, it is ORDERED that the contingent settlements should not be offset against the verdict.

However, the Court finds that the Defendant would have a type of subrogation claim for contingent settlements that are realized in the future. Therefore, it is ORDERED that any contingent settlements realized in the future shall be paid to the Defendant but reduced by twenty five percent for loss of consortium and punitive damages and further reduced by the attorney fees and costs which Plaintiff's counsel receives for handling and processing the claims.

6. The next issue concerns the order in which the offsets are deducted from the verdict. It is ORDERED that the offsets for the settlements should be deducted first and then the percentage of negligence attributed to the Plaintiff should be deducted.

7. The final issue concerns whether post judgment interest should commence on the date of the verdict or the date the judgment order is entered. It is ORDERED that the interest shall begin to accrue on the date this judgment order is entered.

In accordance with the orders set forth herein, the Court finds, in this case, that the contingent settlements should not be offset but rather should be paid to the Defendants, once they are realized and collected, in accordance with the terms set forth herein. The settlements totaling $13,903.06 should be reduced by twenty five percent or $1,390.31 for loss of consortium and $2,085.46 for punitive damages for a total reduction of $3,475.77. Thus the offset would be $10,427.29.

Therefore, the verdict ($913,860.00) minus the offset ($10,427.29) results in a net judgment of $903,432.71. This sum reduced by the amount of the Plaintiff's negligence (31%) would result in a judgment for $623,368.57.

WHEREFORE, it is ORDERED that the judgment should be and hereby is entered in favor of the Plaintiff for the sum of $623,368.57 together with interest at the federal rate of interest which shall accrue from the date this order is entered until the sum is paid in ful. The objections of the Defendant and the Plaintiff are noted.

It is further ORDERED that the Clerk of this Court shall send a copy of this Order to all counsel of record.

1/6/99
DATE

[illegible]
JUDGE

Prepared by:

/s/ Edward L. Pauley
Edward L. Pauley
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Reviewed by:

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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Jan 6, 1999]

CIVIL ACTION NO. 93-C-6876

CARL RICHARD BUTLER,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
A Virginia Corporation
Defendant.

JUDGMENT ORDER

On the 19th day of October, 1998 came the parties by counsel for purposes of hearing the Plaintiff's Motion for Entry of Judgment. After reviewing the briefs of the parties and hearing the oral arguments regarding same, the Court finds as follows:

1. Following trial in the above-referenced matter, the jury awarded the Plaintiff $1,047,000.00 in damages. The jury found the Plaintiff to be 0% at fault for his lung damage.

2. Prior to the trial of this case, the Plaintiff had brought suit for his lung injuries against various manufacturers of asbestos and asbestos containing products. Also prior to the trial of this case, the Plaintiff and his wife settled their claims against some of the defendants. The settlements included compensation for personal injury, punitive damages and loss of consortium claims on behalf of the spouse. The settlements total $40,147.21.

3. The Plaintiff has additional settlements that are contingent in nature and are not guaranteed payments. These total $ 8,984.41.

4. The Court finds that the settlements should be offset from the verdict. However, the issue is whether the entire amount of the settlements should be offset against the verdict. The Court finds that the damages available in an action brought under the Federal Employees' Liability Act (hereinafter "FELA") are different than in a regular civil suit, in this case a products liability type action, governed by West Virginia law. The Court finds that the Plaintiff would be entitled to punitive damages and his spouse would be entitled to loss of consortium damages in a regular civil suit governed by West Virginia law. However, the Plaintiff would not be entitled to those same damages in a FELA action.

Therefore, the Court finds that the settlements obtained by the Plaintiff against Defendants in nonFELA cases, as listed above, would include punitive and loss of consortium damages. The Court further finds that the settlements must be offset against the verdict but the Plaintiff should get credit for the punitive and loss of consortium damages which are part of said settlements.

The settlements in question are lump sum settlements with no indication of which portion of the payment is for compensatory, loss of consortium or punitive damages. Therefore, the Court finds, based upon its own experience with civil cases in Kanawha County, that a reasonable credit for the Plaintiff would be for ten percent of the settlements to constitute damages for loss of consortium and fifteen percent to constitute punitive damages. It is therefore ORDERED that twenty five percent of the Plaintiff's settlements shall be credited to the Plaintiff and that seventy five percent of the settlements should be deducted from the verdict.

5. The next issue concerns contingent settlements. The Court finds that the Plaintiff has settlements which are unrealized and contingent in nature. The Court further finds that it would be unfair to allow an offset against the verdict for settlements which are contingent in nature. Therefore, it is ORDERED that the contingent settlements should not be offset against the verdict.

However, the Court finds that the Defendant would have a type of subrogation claim for contingent settlements that are realized in the future. Therefore, it is ORDERED that any contingent settlements realized in the future shall be paid to the Defendant but reduced by twenty five percent for loss of consortium and punitive damages and further reduced by the attorney fees and costs which Plaintiff's counsel receives for handling and processing the claims.

6. The next issue concerns the order in which the offsets are deducted from the verdict. It is ORDERED that the offsets for the settlements should be deducted first and then the percentage of negligence attributed to the Plaintiff should be deducted.

7. The final issue concerns whether post judgment interest should commence on the date of the verdict or the date the judgment order is entered. It is ORDERED that the interest shall begin to accrue on the date of entry of this judgment order.

In accordance with the orders set forth herein, the Court finds in this case that the contingent settlements should not be offset but rather should be paid to the Defendants, once they are realized and collected, in accordance with the terms set forth herein. The settlements totaling $40,147.21 should be reduced by twenty five percent or $4,014.72 for loss of consortium and $6,022.08 for punitive damages for a total reduction of $10,036.80. Thus the offset would be $30,110.41.

Therefore, the verdict ($1,047,000.00) minus the offset ($30,110.41) results in a net judgment of $1,016,889.60.

WHEREFORE, it is ORDERED that the judgment shall be and hereby is entered in favor of the Plaintiff for the sum of $1,016,889.60 together with interest at the federal rate of interest which shall begin to accrue on the date this order is entered until the judgment is paid in full. The objections of the Defendant and the Plaintiff are noted.

It is further ORDERED that the Clerk of this Court shall send a copy of this Order to all counsel of record.

1/16/99
DATE

[Illegible]
JUDGE

Prepared by:

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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Jan 6, 1999]

CIVIL ACTION NO. 93-C-8888

DOYLE H. JOHNSON,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
A Virginia Corporation
Defendant.

JUDGMENT ORDER

On the 19th day of October, 1998 came the parties by counsel for purposes of hearing the Plaintiff's Motion for Entry of Judgment. After reviewing the briefs of the parties and hearing the oral arguments regarding same, the Court finds as follows:

1. Following trial, the jury awarded the Plaintiff $1,230,806.00 in damages. The jury also found the Plaintiff to be 14% at fault for his lung damage.

2. Prior to the trial of this case, the Plaintiff had brought suit for his lung injuries against various manufacturers of asbestos and asbestos containing products. Also prior to the trial of this case, the Plaintiff and his wife settled their claims against some of the defendants. The settlements included compensation for personal injury, punitive damages and loss of consortium claims on behalf of the spouse. The settlements totaled $35,616.58.

3. The Plaintiff has additional settlements that are contingent in nature and are not guaranteed payments. These total $8,594.41.

4. The Court finds that the settlements should be offset from the verdict. However, the issue is whether the entire amount of the settlements should be offset against the verdict. The Court finds that the damages available in an action brought under the Federal Employees' Liability Act (hereinafter "FELA") are different than in a regular civil suit, in this case a products liability type action, governed by West Virginia law. The Court finds that the Plaintiff would be entitled to punitive damages and his spouse would be entitled to loss of consortium damages in a regular civil suit governed by West Virginia law. However, the Plaintiff would not be entitled to those same damages in a FELA action.

Therefore, the Court finds that the settlements obtained by the Plaintiff against Defendants in nonFELA cases, as listed above, would include punitive and loss of consortium damages. The Court further finds that the settlements must be offset against the verdict but the Plaintiff should get credit for the punitive and loss of consortium damages which are part of said settlements.

The settlements in question are lump sum settlements with no indication of which portion of the payment is for compensatory, loss of consortium or punitive damages. Therefore, the Court finds, based upon its own experience with civil cases in Kanawha County, that a reasonable credit for the Plaintiff would be for ten percent of the settlements to constitute damages for loss of consortium and fifteen percent to constitute punitive damages. It is therefore ORDERED that twenty five percent of the Plaintiff's settlements shall be credited to the Plaintiff and that seventy five percent of the settlements should be deducted from the verdict.

5. The next issue concerns contingent settlements. The Court finds that the Plaintiff has settlements which are unrealized and contingent in nature. The Court further finds that it would be unfair to allow an offset against the verdict for settlements which are contingent in nature. Therefore, it is ORDERED that the contingent settlements should not be offset against the verdict.

However, the Court finds that the Defendant would have a type of subrogation claim for contingent settlements that are realized in the future. Therefore, it is ORDERED that any contingent settlements realized in the future shall be paid to the Defendant but reduced by twenty five percent for loss of consortium and punitive damages and further reduced by the attorney fees and costs which Plaintiff's counsel receives for handling and processing the claims.

6. The next issue concerns the order in which the offsets are deducted from the verdict. It is ORDERED that the offsets for the settlements should be deducted first and then the percentage of negligence attributed to the Plaintiff should be deducted.

7. The final issue concerns whether post judgment interest should commence on the date of the verdict or the date the judgment order is entered. It is ORDERED that the interest shall begin to accrue on the date of entry of this judgment order.

In accordance with the orders set forth herein, the Court finds, in this case, that the contingent settlements should not be offset but rather should be paid to the Defendants, once they are realized and collected, in accordance with the terms set forth herein. The settlements totaling $35,616.58 should be reduced by twenty five percent or $3,561.66 for loss of consortium and $5,342.49 for punitive damages for a total reduction of $8,904.15. Thus the offset would be $26,712.43.

Therefore, the verdict ($1,230,806.00) minus the offset ($26,712.43) results in a net judgment of $1,204,093.60. This sum reduced by the amount of the Plaintiff's negligence (14%) would result in a judgment for $1,035,520.40.

WHEREFORE, it is ORDERED that the judgment should be and hereby is entered in favor of the Plaintiff for the sum of $1,035,520.40 together with interest at the federal rate of interest which shall accrue on the date of entry of this order until the judgment is paid in full. The objections of the Defendant and the Plaintiff are noted.

It is further ORDERED that the Clerk of this Court shall send a copy of this Order to all counsel of record.

1/16/99 — DATE

[Illegible] — JUDGE

Prepared by:

/s/ Edward L. Pauley
Edward L. Pauley
State Bar #5749
James Humphreys and Associates
707 Virginia Street East
Suite 1113
Charleston, WV 25301

Reviewed by:

/s/ Fred Adkins
Fred Adkins
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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Jan 6, 1999]

CIVIL ACTION NO. 92-C-8970

JOHN T. SHIRLEY,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
A Virginia Corporation

Defendant.

JUDGMENT ORDER

On the 19th day of October, 1998 came the parties by counsel for purposes of hearing the Plaintiff's Motion for Entry of Judgment. After reviewing the briefs of the parties and hearing the oral arguments regarding same, the Court finds as follows:

1. Following trial, the jury awarded the Plaintiff $979,800.00 in damages. The jury found the Plaintiff to be 0% at fault for his lung damage.

2. Prior to the trial of this case, the Plaintiff had brought suit for his lung injuries against various manufacturers of asbestos and asbestos containing products. Also prior to the trial of this case, the Plaintiff and his wife settled their claims against some of the defendants. The settlements included compensation for personal injury, punitive damages and loss of consortium claims on behalf of the spouse. The settlements totaled $43,936.76.

3. The Plaintiff has additional settlements that are contingent in nature and are not guaranteed payments. These total $9,144.41.

4. The Court finds that the settlements should be offset from the verdict. However, the issue is whether the entire amount of the settlements should be offset against the verdict. The Court finds that the damages available in an action brought under the Federal Employees' Liability Act (hereinafter "FELA") are different than in a regular civil suit, in this case a products liability type action, governed by West Virginia law. The Court finds that the Plaintiff would be entitled to punitive damages and his spouse would be entitled to loss of consortium damages in a regular civil suit governed by West Virginia law. However, the Plaintiff would not be entitled to those same damages in a FELA action.

Therefore, the Court finds that the settlements obtained by the Plaintiff against Defendants in nonFELA cases, as listed above, would include punitive and loss of consortium damages. The Court further finds that the settlements must be offset against the verdict but the Plaintiff should get credit for the punitive and loss of consortium damages which are part of said settlements.

The settlements in question are lump sum settlements with no indication of which portion of the payment is for compensatory, loss of consortium or punitive damages. Therefore, the Court finds, based upon its own experience with civil cases in Kanawha County, that a reasonable credit for the Plaintiff would be for ten percent of the settlements to constitute damages for loss of consortium and fifteen percent to constitute punitive damages. It is therefore ORDERED that twenty five percent of the Plaintiff's settlements shall be credited to the Plaintiff and that seventy five percent of the settlements should be deducted from the verdict.

5. The next issue concerns contingent settlements. The Court finds that the Plaintiff has settlements which are unrealized and contingent in nature. The Court further finds that it would be unfair to allow an offset against the verdict for settlements which are contingent in nature. Therefore, it is ORDERED that the contingent settlements should not be offset against the verdict.

However, the Court finds that the Defendant would have a type of subrogation claim for contingent settlements that are realized in the future. Therefore, it is ORDERED that any contingent settlements realized in the future shall be paid to the Defendant but reduced by twenty five percent for loss of consortium and punitive damages and further reduced by the attorney fees and costs which Plaintiff's counsel receives for handling and processing the claims.

6. The next issue concerns the order in which the offsets are deducted from the verdict. It is ORDERED that the offsets for the settlements should be deducted first and then the percentage of negligence attributed to the Plaintiff should be deducted.

7. The final issue concerns whether post judgment interest should commence on the date of the verdict or the date the judgment order is entered. It is ORDERED that the interest shall begin to accrue on the date of entry of this judgment order.

In accordance with the orders set forth herein, the Court finds, in this case, that the contingent settlements should not be offset but rather should be paid to the Defendants, once they are realized and collected, in accordance with the terms set forth herein. The settlements totaling $43,936.76 should be reduced by twenty five percent or $4,393.68 for loss of consortium and $6,590.51 for punitive damages for a total reduction of $10,984.19. Thus the offset would be $32,952.57.

Therefore, the verdict ($979,800.00) minus the offset ($32,952.57) results in a net judgment of $946,847.43.

WHEREFORE, it is ORDERED that the judgment should be and hereby is entered in favor of the Plaintiff for the sum of $946,847.43 together with interest at the federal rate of interest which shall begin to accrue on the date of entry of this order and so accrue until the judgment is paid in full. The objections of the Defendant and the Plaintiff are noted.

It is further ORDERED that the Clerk of this Court shall send a copy of this Order to all counsel of record.

1/16/99 — DATE

[Illegible] — JUDGE

Prepared by:

/s/ Edward L. Pauley
Edward L. Pauley
State Bar #5749
James Humphreys and Associates
707 Virginia Street East
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Charleston, WV 25301

Reviewed by:

/s/ Fred Adkins
Fred Adkins
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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Jan 6, 1999]

CIVIL ACTION NO. 93-C-7004

JAMES MCCOY SPANGLER,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
A Virginia Corporation
Defendant.

JUDGMENT ORDER

On the 19th day of October, 1998 came the parties by counsel for purposes of hearing the Plaintiff's Motion for Entry of Judgment. After reviewing the briefs of the parties and hearing the oral arguments regarding same, the Court finds as follows:

1. Following trial, the jury awarded the Plaintiff $868,500.00 in damages. The jury also found the Plaintiff to be 37% at fault for his lung damage.

2. Prior to the trial of this case, the Plaintiff had brought suit for his lung injuries against various manufacturers of asbestos and asbestos containing products. Also prior to the trial of this case, the Plaintiff and his wife settled their claims against some of the defendants. The settlements included compensation for personal injury, punitive damages and loss of consortium claims on behalf of the spouse. The settlements totaled $49,840.66.

3. The Plaintiff has additional settlements that are contingent in nature and are not guaranteed payments. These total $8,484.41.

4. The Court finds that the settlements should be offset from the verdict. However, the issue is whether the entire amount of the settlements should be offset against the verdict. The Court finds that the damages available in an action brought under the Federal Employees' Liability Act (hereinafter "FELA") are different than in a regular civil suit, in this case a products liability type action, governed by West Virginia law. The Court finds that the Plaintiff would be entitled to punitive damages and his spouse would be entitled to loss of consortium damages in a regular civil suit governed by West Virginia law. However, the Plaintiff would not be entitled to those same damages in a FELA action.

Therefore, the Court finds that the settlements obtained by the Plaintiff against Defendants in nonFELA cases, as listed above, would include punitive and loss of consortium damages. The Court further finds that the settlements must be offset against the verdict but the Plaintiff should get credit for the punitive and loss of consortium damages which are part of said settlements.

The settlements in question are lump sum settlements with no indication of which portion of the payment is for compensatory, loss of consortium or punitive damages. Therefore, the Court finds, based upon its own experience with civil cases in Kanawha County, that a reasonable credit for the Plaintiff would be for ten percent of the settlements to constitute damages for loss of consortium and fifteen percent to constitute punitive damages. It is therefore ORDERED that twenty five percent of the Plaintiff's settlements shall be credited to the Plaintiff and that seventy five percent of the settlements should be deducted from the verdict.

5. The next issue concerns contingent settlements. The Court finds that the Plaintiff has settlements which are unrealized and contingent in nature. The Court further finds that it would be unfair to allow an offset against the verdict for settlements which are contingent in nature. Therefore, it is ORDERED that the contingent settlements should not be offset against the verdict.

However, the Court finds that the Defendant would have a type of subrogation claim for contingent settlements that are realized in the future. Therefore, it is ORDERED that any contingent settlements realized in the future shall be paid to the Defendant but reduced by twenty five percent for loss of consortium and punitive damages and further reduced by the attorney fees and costs which Plaintiff's counsel receives for handling and processing the claims.

6. The next issue concerns the order in which the offsets are deducted from the verdict. It is ORDERED that the offsets for the settlements should be deducted first and then the percentage of negligence attributed to the Plaintiff should be deducted.

7. The final issue concerns whether post judgment interest should commence on the date of the verdict or the date the judgment order is entered. It is ORDERED that the interest shall begin to accrue on the date of entry of this judgment order.

In accordance with the orders set forth herein, the Court finds, in this case, that the contingent settlements should not be offset but rather should be paid to the Defendants, once they are realized and collected, in accordance with the terms set forth herein. The settlements totaling $49,840,66 should be reduced by twenty five percent or $4,984.07 for loss of consortium and $7,476.10 for punitive damages for a total reduction of $12,460.17. Thus the offset would be $37,380.49.

Therefore, the verdict ($868,500.00) minus the offset ($37,380.49) results in a net judgment of $831,119.51. This sum reduced by the amount of the Plaintiff's negligence (37%) would result in a judgment for $523,605.30.

WHEREFORE, it is ORDERED that the judgment should be and hereby is entered in favor of the Plaintiff for the sum of $523,605.30 together with interest at the federal rate of interest which shall begin to accrue on the date of the entry of this order and so accrue until the judgment is paid in full. The objections of the Defendant and the Plaintiff are noted.

It is further ORDERED that the Clerk of this Court shall send a copy of this Order to all counsel of record.

1/16/99	[Illegible]
DATE	JUDGE

Prepared by:

/s/ Edward L. Pauley
Edward L. Pauley
State Bar #5749
James Humphreys and Associates
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Reviewed by:

/s/ Fred Adkins
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IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

[Filed Jan 6, 1999]

CIVIL ACTION NO. 92-C-5829

CLIFFORD ARTHUR VANCE,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
A Virginia Corporation
Defendant.

JUDGMENT ORDER

On the 19th day of October, 1998 came the parties by counsel for purposes of hearing the Plaintiff's Motion for Entry of Judgment. After reviewing the briefs of the parties and hearing the oral arguments regarding same, the Court finds as follows:

1. Following trial, the jury awarded the Plaintiff $770,640.00 in damages. The jury found the Plaintiff to be 0% at fault for his lung damage.

2. Prior to the trial of this case, the Plaintiff had brought suit for his lung injuries against various manufacturers of asbestos and asbestos containing products. Also prior to the trial of this case, the Plaintiff and his wife settled their claims against some of the defendants. The settlements included compensation for personal injury, punitive damages and loss of consortium claims on behalf of the spouse. The settlements totaled $33,690.61.

3. The Plaintiff has additional settlements its that are contingent in nature and are not guaranteed payments. These total $12,394.41.

4. The Court finds that the settlements should be offset from the verdict. However, the issue is whether the entire amount of the settlements should be offset against the verdict. The Court finds that the damages available in an action brought under the Federal Employees' Liability Act (hereinafter "FELA") are different than in a regular civil suit, in this case a products liability type action, governed by West Virginia law. The Court finds that the Plaintiff would be entitled to punitive damages and his spouse would be entitled to loss of consortium damages in a regular civil suit governed by West Virginia law. However, the Plaintiff would not be entitled to those same damages in a FELA action.

Therefore, the Court finds that the settlements obtained by the Plaintiff against Defendants in nonFELA cases, as listed above, would include punitive and loss of consortium damages. The Court further finds that the settlements must be offset against the verdict but the Plaintiff should get credit for the punitive and loss of consortium damages which are part of said settlements.

The settlements in question are lump sum settlements with no indication of which portion of the payment is for compensatory, loss of consortium or punitive damages. Therefore, the Court finds, based upon its own experience with civil cases in Kanawha County, that a reasonable credit for the Plaintiff would be for ten percent of the settlements to constitute damages for loss of consortium and fifteen percent to constitute punitive damages. It is therefore ORDERED that twenty five percent of the Plaintiff's settlements shall be credited to the Plaintiff and that seventy five percent of the settlements should be deducted from the verdict.

5. The next issue concerns contingent settlements. The Court finds that the Plaintiff has settlements which are unrealized and contingent in nature. The Court further finds that it would be unfair to allow an offset against the verdict for settlements which are contingent in nature. Therefore, it is ORDERED that the contingent settlements should not be offset against the verdict.

However, the Court finds that the Defendant would have a type of subrogation claim for contingent settlements that are realized in the future. Therefore, it is ORDERED that any contingent settlements realized in the future shall be paid to the Defendant but reduced by twenty five percent for loss of consortium and punitive damages and further reduced by the attorney fees and costs which Plaintiff's counsel receives for handling and processing the claims.

6. The next issue concerns the order in which the offsets are deducted from the verdict. It is ORDERED that the offsets for the settlements should be deducted first and then the percentage of negligence attributed to the Plaintiff should be deducted.

7. The final issue concerns whether post judgment interest should commence on the date of the verdict or the date the judgment order is entered. It is ORDERED that the interest shall begin to accrue on the date of entry of this judgment order.

In accordance with the orders set forth herein, the Court finds, in this case, that the contingent settlements should not be offset but rather should be paid to the Defendants, once they are realized and collected, in accordance with the terms set forth herein. The settlements totaling $33,690.61 should be reduced by twenty five percent or $3,369.06 for loss of consortium and $5,053.59 for punitive damages for a total reduction of $8,422.65. Thus the offset would be $25,267.96.

Therefore, the verdict ($770,640.00) minus the offset ($25,267.96) results in a net judgment of $745,372.04.

WHEREFORE, it is ORDERED that the judgment should be and hereby is entered in favor of the Plaintiff for the sum of $745,372.04 together with interest at the federal rate of interest which shall begin to accrue on the date of entry of this order and shall so accrue until the judgment is paid in full. The objections of the Defendant and the Plaintiff are noted.

It is further ORDERED that the Clerk of this Court shall send a copy of this Order to all counsel of record.

January 26, 1999 — DATE

[Illegible] — JUDGE

Prepared by:

/s/ Edward L. Pauley
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Charleston, WV 25301

Reviewed by:

/s/ Fred Adkins
Fred Adkins
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611 Third Avenue
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Huntington, W.Va. 25722-2185

SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKETING STATEMENT

Type of Action: √ Civil, □ Criminal
Petitioner(s): □ Plaintiff(s), √ Defendant(s)

Style: CLIFFORD VANCE
FREEMAN RAY AYERS
CARL RICHARD BUTLER
JAMES MCCOY SPANGLER
DOYLE JOHNSON
JOHN T. SHIRLEY, *et ux.*,
Plaintiff(s),

vs.

NORFOLK AND WESTERN RAILWAY COMPANY
Individually and as successor to the Norfolk Southern Railway Company, a Virginia Corporation, *et al.*,
Defendant(s).

Circuit:

County: *Kanawha*

Judge: *A. Andrew MacQueen, III*

Circuit Number: *Thirteenth*

A. Timeliness of Appeal

1. Date of entry of judgment or order appealed from: *January 6, 1999*
2. Filing date of any post judgment motion filed by any party pursuant to R. Civ. P. 50(b), 52(b), or 59: *January 19, 1999*
3. Date of entry of order deciding post judgment motion: *February 27, 2001*

4. Date of filing of petition for appeal: *March 12, 2001*
5. Date of filing of amended petition for appeal: August 13, 2001

B. Finality of Order or Judgment

1. Is the order or judgment appealed from a final decision on the merits as to all issues and parties? *Yes*
2. If no, was the order or judgment entered pursuant to R. Civ. P. 54(b)? Yes □ No √
3. Has the defendant been convicted? N/A
4. Has a sentence been imposed? N/A
5. Is the defendant incarcerated? N/A

C. Has this case previously been appealed? *No*

If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

D. Are there any related cases currently pending in the Supreme Court of Appeals or Circuit Court? Yes □ No √

E. State the nature of the suit, the relief sought, and the outcome below. [Attach an additional sheet, if necessary]

Plaintiffs, all retired or former employees of NSRC [1] who worked in various jobs with NSRC, sued Defendant under the Federal Employer's Liability Act (FELA), 45 U.S.C. Section 51, *et seq.* alleging that they contracted asbestosis or mixed dust pneumoconiosis at least

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[1] Effective September 1, 1998, the Norfolk & Western Railway Company was merged into the Norfolk Southern Railway Company and ceased to exist as a separate corporate entity. The Norfolk Southern Railway Company has succeeded to and now owns all of the assets formerly owned by the Norfolk & Western Railway Company and has assumed and is responsible for all of the debts and obligations of the Norfolk & Western Railway Company.

in part as a result of their employment with defendant. Plaintiffs sought only damages for pain and suffering. There were no special damages, and punitive damages are not permitted by the FELA.

The jury found in favor of the plaintiffs, and the award to each plaintiff in these cases is as follows:

Clifford Arthur Vance:	$770,640
Freeman Ray Ayers:	$913,860
Carl Richard Butler:	$1,047,000
James McCoy Spangler:	$868,500
Doyle Johnson:	$1,230,806
John T. Shirley:	$979,800

F. Issues to be raised on appeal. [Attach an additional sheet, if necessary].

Defendant seeks a new trial, on these grounds:

6. The Court erred in not instructing the jury to apportion causation to each of the plaintiffs' potential sources of exposure.

7. The Court erred by consolidating the plaintiffs' individual cases into one trial.

8. The Court erred in refusing to allow the defendant to introduce evidence on state-of-the-art defenses particularly including, but not limited to, evidence regarding the time frame during which manufacturers of asbestos-containing products first warned consumers of the potential hazards associated with exposure to asbestos-containing products.

9. Defendant was precluded from developing evidence to prove that Plaintiffs did not file their lawsuits within the applicable three (3) year statute of limitations.

10. The Court allowed evidence of cancer, risk of cancer and fear of cancer when plaintiffs could not support a claim for cancer or fear of cancer.

11. The Court erred by not granting a new trial or a substantial remittitur of damages.

G. Do you wish to make an oral presentation of the petition? Yes √ No ☐

H. Has the entire or only portions of the record been designated? *Portions*

I. If the appeal is granted, do you desire reproduction of the record or that the case be heard on the original record? Reproduced √ Original ☐

J. List each adverse party to the appeal. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.

1. Adverse party(s): CLIFFORD ARTHUR VANCE
FREEMAN RAY AYERS
CARL RICHARD BUTLER
JAMES MCCOY SPANGLER
DOYLE JOHNSON
JOHN T. SHIRLEY

Attorney: James A. McKowen, Esquire

Firm: James F. Humphreys & Associates

Address: Bank One Center, Suite 1113 707 Virginia Street, East
Charleston, West Virginia 25301

Telephone: (304) 347-5050

K. Petitioner(s) name: *Norfolk Southern Railway, Company*

L. Attorney or pro se litigant filing Docketing Statement: Attorney

Will you be handling the appeal? (In criminal cases, counsel below will handle the appeal unless relieved by the court). *Yes*

Name: Fred Adkins, Esquire, and Rodney L. Baker II, Esquire
Firm: Huddleston, Bolen, Beatty, Porter & Copen, LLP
Address: 611 Third Avenue
Huntington, West Virginia 25701
Telephone: (304) 691-8310

If this is a joint statement by multiple petitioners, add the names and addresses of the other petitioners and counsel joining in this Docketing Statement on an additional sheet, accompanied by a certification that all petitioners concur in this filing.

Signature /s/ Fred Adkins
Fred Adkins
Date 8-13-01

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

FREEMAN AYERS	CIVIL ACTION NO. 93-C-6857
DOYLE JOHNSON	CIVIL ACTION NO. 92-C-8888
JAMES SPANGLER	CIVIL ACTION NO. 93-C-7004
CLIFFORD VANCE	CIVIL ACTION NO. 92-C-5829
JOHN SHIRLEY	CIVIL ACTION NO. 92-C-8970
CARL BUTLER	CIVIL ACTION NO. 93-C-6876

Plaintiffs/Respondents,

V.

NORFOLK AND WESTERN RAILWAY COMPANY,
a corporation, et al.

Defendants/Petitioners.

AMENDED PETITION FOR APPEAL

ON APPEAL FROM THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

Fred Adkins, Esquire (WVSB No.: 0076)
Rodney Baker II, Esquire (WVSB No.: 6859)
HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN
611 Third Avenue
P.O. Box 2185
Huntington, WV 25722-2185
(304) 691-8310

Counsel for Defendants/Petitioners

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AMENDED PETITION FOR APPEAL OF DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY

INTRODUCTION

This Amended Petition is fled by the defendant/petitioner Norfolk Southern Railway Company [1] (hereinafter "defendant" or "NSRC") for Appeal from the judgments entered in favor of plaintiffs/respondents Clifford Arthur Vance, Freeman Ray Ayers, Carl Richard Butler, James McCoy Spangler, Doyle Johnson, and John T. Shirley (hereinafter "plaintiffs") by the Circuit Court of Kanawha County, West Virginia on April 29, 1998 [2]. Because of the errors committed below, this Petition should be granted so that a new trial may be awarded.

KIND OF PROCEEDING AND NATURE OF RULING IN LOWER COURT

These actions were fled under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51, *et seq.*, by six retired or former employees of Defendant. The cases were consolidated for trial over defendant's objection. The plaintiffs alleged that they suffered from shortness of breath and other conditions due to exposure to asbestos and other dusts in their various occupations with defendant and with other employers. *No plaintiff suffered from lung cancer, or from*

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[1] Effective Septeınber 1, 1998, the Norfolk & Western Railway Company was merged into the Norfolk Southern Railway Company and ceased to exist as a separate corporate entity. The Norfolk Southern Railway Company has succeeded to and now owns all of the assets formerly owned by the Norfolk & Western Railway Company and has assumed and is responsible for all of the debts and obligations of the Norfolk & Western Railway Company.

[2] Although a large portion of the trial transcript has been produced, important parts of the transcript have not been produced. In some instances, the only available references are the trial notes of NSRC's counsel.

mesothelioma, but Plaintiffs' main theme during trial was *cancer and fear of cancer.*

Trial was held in this action from April 13, 1998 to April 29, 1998, with the jury finding NSRC negligent and awarding damages totaling five million eight hundred ten thousand six hundred six dollars ($5,810,606). Carl Butler, an employee of NSRC for less than three years with only *three months* claimed opportunity for exposure to asbestos while employed by the railroad, also worked as *a union pipefitter for thirty-three years* with admitted heavy exposure to asbestos during his tenure as a pipefitter, was awarded one million forty-seven thousand dollars ($1,047,000). *TT* Pgs. 8-12, April 29, 1998. Freeman Ayers was awarded damages in the amount of nine hundred thirteen thousand eight hundred sixty dollars ($913,860). *Id.* Doyle Johnson's damage award was one million two hundred thirty thousand eight hundred six dollars ($1,230,806). *Id.* John Shirley was awarded nine hundred seventy-nine thousand eight hundred dollars ($979,800). *Id.* The jury awarded James Spangler damages of eight hundred sixty-eight thousand five hundred dollars ($868,500). *Id.* Clifford Vance was awarded seven hundred seventy thousand six hundred forty dollars ($770,640). *Id.*

Defendant's Motion for Judgment as a Matter of Law, for New Trial, or for Remittitur was denied by Order entered February 27, 2001.[3]

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[3] Apparently an earlier Order entered September 12, 2000 was hand delivered to Judge MacQueen and the Kanawha County Circuit Clerk by plaintiff's counsel. This Order was never provided to NSRC's counsel by the Circuit Clerk of Kanawha County. NSRC's counsel first learned of the September 12, 2000 Order during a January 26, 2001 telephone conference with plaintiff's counsel. In addition, an identical Order entered November 13, 2000 was not received by NSRC's counsel until December 21, 2000. NSRC's counsel promptly filed a Rule 60(b) Motion to Vacate. Judge MacQueen granted NSRC's Motion to Vacate and denied NSRC's Motion for New Trial by Order entered February 27, 2001. It is from the February 27, 2001 Order that NSRC appeals. In any event this Petition is filed within the time period initiated by the entry of the Court's Order of November 13, 2000 which was received by NSRC's counsel on December 21, 2000. On the off chance that this Court finds NSRC's Petition for Appeal untimely, NSRC has filed a West Virginia Rule of Appellate Procedure Rule 2 Motion asking this Court to find good cause for enlarging the time for filing of NSRC's Petition for Appeal.

STATEMENT OF FACTS

Plaintiffs alleged that in their work for Defendant in various crafts they were "exposed" to asbestos, sand and coal dust which caused them to develop asbestosis or mixed dust pneumoconiosis.

Carl R. Butler

At the time of trial, Carl Butler was sixty-six years (66) old with a fifteen year smoking history. *Trial Transcript*, hereinafter "*TT*" Pgs. 198, 199 & 209, April 16, 1998. He worked for NSRC as a machinist apprentice and a carman apprentice for three months in 1951 and for eighteen months in 1956 and 1957 in Princeton, West Virginia, but he testified that he only had an opportunity for exposure to asbestos during the three months that he worked for the railroad in 1951. *TT* Pgs. 200 & 203, April 16, 1998 . The majority of his work career, approximately 33 years, was spent as a union pipefitter with significant exposure to asbestos. *TT* Pgs. 212 & 213, April 16, 1998.

Dr. Gaziano, plaintiff's retained witness, made a diagnosis of mixed dust pneumoconiosis in Mr. Butler's case. *TT* Pg. 183, April 16, 1998. According to Dr. Gaziano, a mixed dust pneumoconiosis is caused by exposure to more than one type of dust. *TT* Pg. 164, April 16, 1998. Dr. Gaziano admitted that Mr. Butler did not tell him that he was exposed to sand or coal dust while employed by the railroad thus, in Dr. Gaziano's opinion, any injury to Mr. Butler caused by sand or coal dust exposure was not caused by his railroad em-

ployment. *TT* Pg. 182, April 16, 1998. Dr. Gaziano admitted that, at most, Mr. Butler's three month opportunity for exposure to asbestos while employed by the railroad played only a minimal role in his alleged development of disease; the majority of his exposure occurred during his 33 year career as a union pipefitter. *TT* Pg. 182, April 16, 1998. Dr. Gaziano testified that Mr. Butler's mixed dust pneumoconiosis caused Mr. Butler to have "a mild obstruction in the throat" which would not prevent him from engaging in the "normal activities as what's usual for someone of his age". *TT* Pgs. 99 & 184, April 16, 1998. The jury returned a verdict in favor of Mr. Butler in the amount of $1,047,000.00. *TT* Pg. 10, April 29, 1998.

Freeman R. Ayers

Freeman Ayers was seventy (70) years old at the time of the trial with a fifty pack year smoking history. *TT* Pg. 3, April 17,1998; *TT* Pg. 100, April 22, 1998. He went to work for NSRC in Princeton in either 1946 or 1947 where he worked as a mechanics helper/laborer for about two-and-a-half years. *TT* Pgs. 8 & 15. After getting laid off from the railroad, Mr. Ayers returned to railroad employment where he worked 10-11 years as a yard brakeman before leaving railroad employment in 1961-62. *TT* Pgs. 16 & 20, April 17, 1998.

Plaintiff's retained witness, Dr. Gaziano, testified that Mr. Ayers had asbestosis caused *equally* by Mr. Ayers' claimed exposure to asbestos while employed by the railroad and by Mr. Ayers' exposure to asbestos during his automotive maintenance career. *TT* Pg. 132, April 16, 1998. Defendant's expert, Dr. Joseph Renn, testified that Mr. Ayers did not have a pneumoconiosis. *TT* Pg. 98, April 22, 1998. Dr. Renn believed that Mr. Ayers had a mild obstructive lung impairment caused by his 40-50 pack year smoking history.

TT Pg. 100, April 22, 1998. The jury returned a verdict for Mr. Ayers in the amount of $913,860.00. *TT* Pg. 9, April 29, 1998.

Doyle H. Johnson

At the time of trial, Doyle Johnson was sixty (60) years old. *TT* Pg. 5, April 17, 1998. He had a thirty-four to sixty-four pack year smoking history. *TT* Pg. 101, April 22, 1998. He worked primarily as a maintenance of way worker but also as a laborer and welder helper, and maintenance of way worker for NSRC in and around Williamson, West Virginia from 1952 to 1987. *TT* Pgs. 7, 16, 20, & 50, April 17, 1998.

Dr. Renn testified that the plaintiff did not suffer from a pneumoconiosis. Mr. Johnson had a mild obstructive ventilatory impairment and a reduction in diffusing capacity for carbon monoxide caused respectively by asthma and a pulmonary embolus following casting of his knee in 1987. *TT* Pgs. 101, 102, 105 & 106. The jury returned a verdict in the amount of $1,230,806. 00 in favor of Mr. Johnson. *TT* Pgs. 10 & 11, April 29, 1998.

John T. Shirley

John Shirley was sixty-nine (69) years old at the time of trial. *TT* Pg. 03, April 17, 1998. He worked intermittently as a clerk for the railroad from 1947 until 1976 when he took a disability retirement after injuring his back. *TT* Pgs. 6 & 7, April 17, 1998.

Dr. Renn testified that the plaintiff did not a have a pneumoconiosis or a pulmonary function impairment. *TT* Pgs. 117 & 119, April 22, 1998. The jury returned a verdict in favor of Mr. Shirley in the amount of $979,800.00. *TT* Pg. 11, April 29, 1998.

James M. Spangler

James Spangler was seventy-three (73) years old a the time of trial. He reported a one hundred twelve pack year smoking

history to Dr. Renn. *TT* Pg. 81, April 22, 1998. He worked as a pipefitter and carman helper from 1942 to 1950 and from 1955 to 1980 in Bluefield and Princeton, West Virginia. *TT* Pgs. 54 & 55, April 20, 1998.

Dr. Renn testified that Mr. Spangler did not have a pneumoconiosis but instead suffered from a severe cigarette smoking induced broncho-reversible obstructive ventilatory defect which included emphysema. *TT* Pg. 86, April 22, 1998. The jury returned a verdict for Mr. Spangler in the amount of $868,500.00. *TT* Pg. 12, April 29, 1998.

Clifford A. Vance

Clifford Vance was seventy-seven (77) years old at the time of trial. *TT* Pg. 171, April 15, 1998. Mr. Vance worked as a laborer and hostler for NSRC from 1942 to 1969 and from 1967 until 1981 when he took a regular retirement based on his years of service. *TT* Pgs. 174, 181, 184, 189, 190, 191 & 193, April 15, 1998.

Dr. Renn testified that Mr. Vance did not have a pneumoconiosis or a ventilatory impairment despite having a forty-seven to seventy-one pack year smoking history. *TT* Pgs. 108 & 111, April 22, 1998. The jury returned a verdict for Mr. Vance in the amount of $770,640.00. *TT* Pg. 12, April 29, 1998.

ASSIGNMENTS OF ERROR

I. THE COURT ERRED IN SUBMITTING TO THE JURY PLAINTIFFS' "FEAR OF CANCER" CLAIMS, AND IN RECEIVING EVIDENCE OF INCREASED RISK OF CANCER, AND DEFENDANT IS THEREFORE ENTITLED TO A NEW TRIAL

   A. No Plaintiff Had Cancer or Symptoms of Cancer

   B. No Plaintiff Had A Physical Manifestation of Fear of Cancer

II. EXCLUSION OF STATE OF THE ART EVIDENCE INCLUDING EVIDENCE OF WHEN MANUFACTURERS OF ASBESTOS CONTAINING PRODUCTS FIRST PLACED WARNINGS ON THEIR PRODUCTS CONSTITUTES REVERSIBLE ERROR

III. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY TO APPORTION CAUSATION TO EACH OF PLAINTIFFS' POTENTIAL SOURCES OF EXPOSURE

IV. THE COURT ERRED BY CONSOLIDATING THESE CASES FOR TRIAL

V. THE COURT ERRED IN PREVENTING DEFENDANT FROM INQUIRING INTO ACCRUAL OF THE STATUTE OF LIMITATIONS AND IN REFUSING TO INSTRUCT THE JURY ON THE STATUTE OF LIMITATIONS

VI. A NEW TRIAL OR REMITTITUR IS WARRANTED BECAUSE THE JURY'S VERDICTS WERE NOT SUPPORTED BY THE EVIDENCE AND WERE GROSSLY EXCESSIVE

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DISCUSSION OF LAW

The Federal Employers' Liability Act, 45 U.S.C., § 51, *et seq.*, is a federal law passed by the United States Congress in 1908 setting forth a compensation scheme for injured railroad workers and limited others. The Federal Employers' Liability Act provides the exclusive remedy for railroad workers and all recovery actions fall within the ambit of the FELA to the exclusion of common and statutory laws of the states. *Erie Railroad Company v. Winfield*, 244 U.S. 170 (1917). The FELA supersedes all state and municipal legislation, including workers' compensation statutes or similar "no fault" recovery statutes. *C&O Railway Company v. Stapleton*, 279 U.S. 587 (1929).

Although the Federal Employers' Liability Act is a legislative act which provides a potential means of recovery for injured railroad workers, it is by no means a strict liability statute or a "no fault" mechanism. For an employee to prevail against his employer in an FELA case, he must satisfy all requirements of a common law negligence case; namely, duty, negligence, causation, foreseeability of harm and damages. *Inman v. Baltimore & Ohio Railroad Co.*, 361 U.S. 138 (1959); *Davis v. Burlington Northern, Inc.*, 541 F.2d 182 (8th Cir. 1976), *cert. denied*, 429 U.S. 879 (1976). The plaintiff's failure to prove any one of these common law elements mandates a verdict for the defendant railroad.

All matters of a substantive nature raised in a FELA case are governed by federal law. All questions relating to recoverable damages, sufficiency of the Complaint and sufficiency of evidence to submit a case to a jury are matters governed by federal law. *Norfolk and Western Railway Company v. Liepelt*, 444 U.S. 490 (1980), *Brady v Southern*, 320 U.S. 476 (1943).

While FELA cases may be adjudicated in state courts, decisions of federal courts in interpreting the FELA are

binding on those state courts in their administration of the Act. *Urie v. Thompson*, 337 U.S. 163 (1949). Strictly procedural matters are governed by state law in those FELA cases pending in state courts.

I. THE COURT ERRED IN SUBMITTING TO THE JURY PLAINTIFFS' "FEAR OF CANCER" CLAIMS, AND IN RECEIVING EVIDENCE OF INCREASED RISK OF CANCER, AND DEFENDANT IS THEREFORE ENTITLED TO A NEW TRIAL

Judge MacQueen correctly ruled that plaintiffs could not proceed on their claims for increased risk of cancer because they could not meet the FELA threshold requirement of proving that it was more likely than not that they would develop cancer as a result of their alleged exposures to asbestos. *See The Court's Jury Instruction Charge at Pg. 9.* However, Judge MacQueen then ruled that plaintiffs could recover for "fear of cancer" and plaintiffs were allowed to put on evidence of an increased risk of developing cancer for the purpose of supporting their fear of cancer claims. Under the FELA, a plaintiff cannot recover for fear of developing cancer unless the plaintiff has cancer or symptoms of cancer. Likewise, a plaintiff may not recover for an emotional injury unless he has physical manifestations of the claimed emotional injury. None of the plaintiffs in the instant cases had cancer, a symptom of cancer or manifested symptoms of a claimed fear of cancer.

During pretrial argument on this issue, Judge MacQueen stated "Well, if the Plaintiffs don't get up there and say something like they were scared to death that they're going to die from cancer, and they can't get to sleep then I'm not going to let them get any damages." *TT* Pg. 174 April 14, 1998. Despite a lack of any evidence that any plaintiff had a physical manifestation of a fear of cancer, Judge MacQueen

permitted plaintiff's counsel to put on a continuous stream of evidence relating to cancer and allowed the claims of fear of cancer to go to the jury.

A. No Plaintiff Had Cancer or Symptoms of Cancer

With respect to future consequences of injuries, the FELA follows the general rule that damages are recoverable only if it is *probable* that the future consequences will result; mere possibilities will not do. *See Marchica v. Long Island Railroad Co.*, 31 F.3d 1197, 1202 (2nd Cir. 1994); *Virginian Ry. Co. v. Calhoun*, 200 Va. 908, 911, 108 S.E.2d 239 (1959).

The law regarding fear of cancer as applied in FELA asbestos cases *precludes* any reference to fear of cancer or to risk of cancer absent symptoms of the disease or an actual diagnosis of cancer. *Metro-North Commuter R.R.Co. v. Buckley*, 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560, 1997 U.S. Lexis 3867 (1997).

Numerous courts have held that risk of cancer in and of itself is not a compensable injury. *Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232 (1996); *Silkwood v. Kerr-McGee Corporation*, 667 F.2d 908, 919 (10th Cir. 1981) ("complaint based upon the possibility of contracting cancer in the future does not state a common law cause of action"), *rev'd on other grounds*, 464 U.S. 238 (1984); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1502 (11th Cir. 1985) ("None of the appellees had cancer or established that he was reasonably certain to contract it in the future. . . . The challenged evidence [of risk of cancer] thus shed no light on the injury appellees had sustained or were likely to sustain as a result of appellants' alleged negligence.").

In *Watson v. Norfolk & W. Ry. Co.*, 30 Ohio App. 3d 201, 203, 507 N.E.2d 468, 472 (1987), a FELA asbestosis case, the plaintiff's medical expert presented evidence at trial that plaintiff had an "*increased chance*" of developing cancer. *Watson* at 472. The court rejected the evidence, holding that

"an increased chance [of cancer] is a lesser standard than is required under FELA". *Id.* The *Watson* opinion states in relevant part that "[u]nder FELA, a plaintiff may recover damages for fear of developing a harmful condition in the future only when that condition is imminent or would probably occur." *Id.* at 471.

Plaintiffs may argue that a plaintiff cannot recover for fear of cancer if he later develops cancer, but this argument is wholly without merit since such fear, including fear prior to contraction of cancer, is compensable as an element of damages in that second suit. *See Bullard v. Central Vermont Inc.*, 565 F.2d 193,197 (1st Cir. 1977).

No expert witnesses in the cases at bar testified that a plaintiff was more likely than not to develop cancer. No plaintiff testified that he had symptoms of cancer. Without testimony establishing either that a plaintiff had cancer or symptoms of cancer, plaintiffs' fear of cancer claims should have been dismissed in response to NSRC's Motion in Limine on this issue and all evidence of cancer barred from these cases.

B. No Plaintiff Had A Physical Manifestation of Fear of Cancer

The United States Supreme Court adopted the common law "zone of danger" test for recovery for alleged emotional injuries like fear of cancer. The common law "zone of danger" test provides that workers "within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury . . . whereas a worker outside the zone will not." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 556; 114 S.Ct. 2396, 2410 & 2411; 129 L.Ed.2d 427, __ (1994).

The Court recognized that "because negligent infliction of emotional distress is not explicitly addressed in the statute

[FELA], the common law background of this right of recovery must play a vital role in giving content to the scope of an employer's duty under FELA to avoid infliction of emotional injury." *Id.* at 2408. The Court also recognized

> *[M]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover. See, e.g., Garvis v. Employers' Mut. Casualty Co.*, 497 N.W.2d 254 (Minn. 1993) (emphasis added).

Id. at 2407 n.11.

Following *Gottshall*, the Second Circuit recently decided a case which illustrates the boundaries for an emotional injury claim like fear of cancer. The plaintiff in *Marchica v. Long Island Railroad Co.*, 31 F.3d 1197, 1202 (2nd Cir. 1994), unlike the plaintiffs in the case at bar, alleged a claim for negligent infliction of emotional distress. Applying the "zone of danger" test as delineated in *Gottshall*[4], the *Marchica* Court explained, in fear-of-developing-disease cases "the exposure requirement—plus *actual likelihood* of developing the disease—. . . is a means of ensuring the genuineness of the claim." *Marchica*, 31 F. 3d at 1205. In other words, "mental anxiety is not considered reasonable unless there is, at the very least, some evidence substantiating both actual exposure to the disease-causing agent . . . and a likelihood of

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[4] In *Gottshall*, the Court adopted a very narrow view of claims for negligent infliction of emotional distress. Those claims, the Court stated, are reserved to those cases where severe emotional distress occurs as a result of an impact or threat of physical impact where the plaintiff was within the "zone of danger." As the Circuit Court of Appeals for the District of Columbia emphasized, the emotional injuries presented by a FELA plaintiff must be "serious and verifiable." *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 433 (D.C. App. 1994).

contracting the disease as a result. *Doner v. Adams Contracting Inc.*, 617 N.Y.S. 2d 565, 566 (A.D. 3 Dep't 1994).

The plaintiff in *Marchica* sustained a puncture wound from a discarded hypodermic needle. The court found that because the plaintiff suffered a physical impact he was entitled to receive compensation for his emotional injuries. The court noted that the *Marchica* plaintiff, unlike the current respondents, had physical manifestations of emotional distress such as post traumatic stress disorder, accompanied by sleeplessness, weight loss, and vomiting which was indicia of the genuineness of his emotional distress claim.

No plaintiff suffered from any type of lung cancer. There was no evidence that any plaintiff was more likely than not to develop cancer as a result of his alleged exposure to asbestos. No plaintiff had a physical manifestation of "fear of developing cancer". There was no evidence to "guarantee the genuineness" of plaintiffs' claims of fear of cancer. Despite the lack of any evidence of the type required by the FELA to support a fear of cancer claim, the trial court denied defendant's Motion in Limine on this issue and submitted plaintiffs' fear of cancer claims to the jury. Allowing evidence of increased risk of cancer to support plaintiffs' claims for "fear of cancer" was reversible error and justice requires this Court to grant NSRC a new trial on all issues.

II. EXCLUSION OF STATE OF THE ART EVIDENCE INCLUDING EVIDENCE OF WHEN MANUFACTURERS OF ASBESTOS CONTAINING PRODUCTS FIRST PLACED WARNINGS ON THEIR PRODUCTS WAS REVERSIBLE ERROR

Evidence presented at trial established that the acceptable exposure level for asbestos decreased from the 1940s through the 1990s as the scientific and medical communities learned more about the nature of asbestos. The concept that

knowledge and prevailing standards change over time is commonly referred to as the "state-of-the-art". What NSRC knew or should have known at different points in time is the standard for assessing whether NSRC acted reasonably because "reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." *Gallick v. Baltimore and Ohio R. R. Co.*, 372 U.S. 108, 117 (1963). The state-of-the-art evidence in this case was the cornerstone of NSRC's liability defense. Judge MacQueen erroneously prevented NSRC from presenting evidence of when the manufacturers of asbestos-containing products first warned purchasers and end users of the potential dangers associated with the use of asbestos-containing products.

Evidence presented at trial established that asbestos was used by NSRC in varying quantities, at different work sites with varying frequency over a span of years. Dr. Weir testified that NSRC's use of asbestos declined from the late 1950s forward. It is important to appreciate the obvious distinction between NSRC, a purchaser and end-user of asbestos-containing products, and the manufacturers of various asbestos-containing products. As a purchaser and end-user of asbestos-containing products, NSRC had an absolute right to rely on the manufacturers of asbestos-containing products to supply products that were safe for the intended use of the product, i.e. non-defective products. As an end-user, NSRC also had a right to expect that warnings would be provided with or on products that were supplied to NSRC when the manufacturers knew of should have known that the products were dangerous.

During trial, NSRC attempted to put on evidence that manufacturers of asbestos-containing products first placed warnings on their products in the early 1970s through both Dr. Gaziano and Dr. Weir. The court ruled that Dr. Gaziano could testify about general state-of-the-art issues but NSRC

could not question Dr. Gaziano about when the experts, the manufacturers of asbestos-containing products, first placed warnings on their products. *TT* Pg. 21, April 16, 1998.

The trial court believed that the manufacturers of asbestos-containing products knew that asbestos was dangerous before the 1970s but failed to place warnings on asbestos-containing products because the manufacturers conspired to conceal this information from the public to prevent loss of business. *TT* Pgs. 13 & 14, April 16, 1998. Defendant sought to introduce this evidence not to prove the state of the manufacturers' knowledge in the early 1970s, but instead, to show that NSRC did not have warnings about the potential hazards associated with the use of asbestos-containing products in the railroad industry from the most obvious source, the manufacturers of the products, until the early 1970's. *TT* Pg. 63, April 22, 1998.[5]

Under the FELA, the element of foreseeability is extremely important. The United States Supreme Court has determined that "reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." *Gallick*, 372 U.S. 108, 117 (1963). The Court approved an instruction which provided:

> [T]he point of view to be taken should be the view before the mishap occurred, to see what, in the light of the facts then known, should or could reasonably have been anticipated.

Id. at 118 n. 7.

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[5] Plaintiffs argue that Judge MacQueen would have allowed evidence of the absence of manufacturers' warnings until the 1970's had NSRC offered a witness to say that NSRC relied on the lack of warnings. This was argued by plaintiffs' counsel but never espoused by Judge MacQueen as a basis for preventing the admission of this evidence. *TT* Pgs. 11-21, April 16, 1998.

A FELA plaintiff must prove that his injury was foreseeable. "To recover, the plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury." *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir. 1976) (citing *Gallick*, 372 U.S.108, 117, 83 S.Ct. 659, 9 L. Ed.2d 618 (1963). "Negligence which imposes liability must result from a faulty or defective foresight; it is predicated on what should have been anticipated and not merely on what has happened." *Taylor v. Missouri Pacific Railroad Co.*, 510 S.W.2d 735, 737 (Mo. App. 1974).

In short, to prove reasonable foreseeability in a FELA action, the Plaintiff must prove actual or constructive notice to the employer of the defective condition that caused the injury. *Sinclair v. Long Island Railroad*, 985 F.2d 74, 77 (2nd Cir. 1993). In a case "where an employer has no reasonable way to know of the existence of a potential hazard, the employer cannot be held liable for its failure to prevent the hazard." *McKennon v. CSX Transportation*, 897 F. Supp. 1024, 1028 (M.D.Tenn 1995).

Defendant's expert, Dr. Weir testified that the railroad had no reason to know or believe that its employees could be injured by secondary exposure to asbestos until the latter part of the 1970s and by that time the railroad had significantly decreased its use of asbestos-containing products.[6] Plaintiff Carl Butler last worked for NSRC in a position where he believed he may have been exposed to asbestos in *1951, forty-seven years* before his case against NSRC was tried. *TT* Pgs. 200 & 203, April 16, 1998. Freeman Ayers last worked for NSRC in 1961-62. *TT* Pg. 100, April 22, 1998.

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[6] A complete copy of Dr. Weir's testimony was not produced by the court reporter thus this reference to Dr. Weir's testimony is based on NSRC's counsel's recollection.

As a practical matter, the first time that a consumer has reason to believe that a product is or may be dangerous when used in the way that the particular consumer uses the product is when the manufacturer puts a warning on the product or advises the consumer that the product as used by the consumer may be dangerous.

The trial court erroneously prevented NSRC from presenting uncontradicted evidence to the jury concerning the first warnings provided to NSRC by the manufacturers of asbestos-containing products. This information was kept from the jury because the court believed that the manufacturers' deliberately concealed this information from consumers. Whether warnings were withheld innocently or for an improper purpose was irrelevant to the issues in this case. NSRC did not wish to put evidence before the jury as to why the manufacturers did not warn consumers of the dangers associated with asbestos-containing products before the 1970s. The simple fact that warnings were not provided to consumers like NSRC by the manufacturers until the 1970s was the backbone of NSRC's liability defense in these cases because foreseeability of harm is an essential element of negligence under the FELA. Exclusion of this most basic but absolutely essential evidence compels a new trial of these cases.

III. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY TO APPORTION CAUSATION TO EACH OF PLAINTIFFS' POTENTIAL SOURCES OF EXPOSURE

The trial court denied NSRC's Request for Charge No. 10 which addressed causation by one other than NSRC. The trial court then erroneously instructed the jury that NSRC was financially responsible for the Plaintiffs' entire dust related injury if NSRC caused any part of the injury. Section 51 of the Federal Employers' Liability Act (FELA) provides, in

pertinent part, that common carriers by railroad shall be liable in damages for any "injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier. . . ." 45 U.S.C. § 51. Although this statute provides the general rule that a railroad may be liable for an injury to an employee caused by a railroad's negligence, the statute does not explicitly address the issue of whether a railroad is liable for *all* damages associated with a particular claimed injury or health condition regardless of its cause or instead is liable only for the injuries or damages it caused. Since the FELA is silent as to this question, courts must look to federal substantive law for the answer. *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994).

In making its erroneous instruction to the jury the trial court relied primarily on *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 493 (1957). However, the *Rogers* case only answers the question of the amount of evidence required to submit a FELA case to the jury. In *Rogers*, the plaintiff's primary duty was to control weed growth alongside the railway by burning the weeds and vegetation alongside the track. The jury returned a verdict for the plaintiff who was injured when he fell into a culvert after he was overtaken by flames and smoke from the weed control fires while watching for "hot boxes" on passing trains. The Supreme Court of Missouri had reversed the verdict for plaintiff on the grounds that plaintiff's own conduct was the sole cause of his accident. *Id.* at 504.

The United States Supreme Court reversed the ruling of the Supreme Court of Missouri because . . .

> . . . [u]nder this statute *the test of a jury case* is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the

> evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, *if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities*. . . .

Rogers, 352 U.S. at 506-507 (1957) (footnotes omitted) (emphasis added).

Rogers concerns *only* the "test of a jury case" and does not set a negligence standard. Neither does it establish the principle that a railroad is liable for the entire amount of damages arising out of an injury or medical condition, even if the railroad only caused a fraction of the damages.

While some courts have misconstrued the holding in *Rogers*, *Rogers* clearly did not set forth the proposition that slight causation on the part of a railroad rendered moot other causes of plaintiff's injuries. *Rogers* merely held that a jury verdict should not be overturned if "the proofs justify with reason the conclusion that employer negligence played any part" in causing the injury or death. *Rogers*, 352 U.S. at 506. As courts have correctly noted, the language from *Rogers* established the test of a jury case under the FELA but does not establish a test for liability under the FELA. Based on this recognition, courts have reversed verdicts in cases where the court has instructed the jury that the railroad is liable for the entire amount of damages without regard to whether other causes also contributed to the injury. *Dale v. Baltimore & Ohio R. Co.*, 552 A.2d 1037 (Pa. 1989).

The Supreme Court did not hold in *Rogers* that a railroad is liable for 100% of the damages attributable to an injury if the injury was caused in whole or in part by factors unrelated to the railroad's negligence. A plaintiff suing under the FELA must prove that his injury was caused by the railroad's negligence. If a plaintiff proves that his injury was caused, in whole or in part, by the defendant railroad's negligence, then he is entitled to collect only the damages that are attributable to the portion of the injury caused by the railroad's negligence. *See Dale v. Baltimore & Ohio R. Co.*, 552 A.2d 1037 (Pa. 1989); *See also, Shupe v. New York Central System*, 339 F.2d 998 (7th Cir. 1965) (plaintiff cannot recover damages which are not proximately caused by defendant's alleged negligence).

The Supreme Court of Pennsylvania in *Dale v. Baltimore & Ohio R.R. Co.*, 552 A.2d 1037 (Pa. 1989), held that a railroad is liable only for those injuries caused by its negligence, not for conditions or injuries suffered by the plaintiff that may have resulted from other causes. In *Dale*, as in the present case, Dale alleged that he suffered from a lung impairment due to asbestos-related disease as the result of his exposure to asbestos while employed by the B&O. In response to the medical testimony offered by Dale that his lung condition was caused by asbestos exposure, the B&O offered evidence that Dale suffered from a lung disease that he had contracted prior to his work for the B&O.

The Supreme Court of Pennsylvania recognized that 45 U.S.C. § 51, in isolation, did not explicitly answer the question of whether a railroad is liable for all damages attributable to an injury where the railroad caused only a part of the injury. The Court rationalized that because 45 U.S.C.

§ 53 provides that an employee's contributory negligence shall diminish his recovery in proportion to the amount of negligence attributable to such employee . . .

> . . . it is implicit in the statutory scheme that liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused.

Dale at 1041.

The Supreme Court of Pennsylvania went on to hold:

> (A)n FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

Id at 1041.

In *Sauer v. Burlington Northern*, 106 F.3d 1490 (Tenth Cir. 1996), the plaintiff was a railroad conductor who had suffered two workplace accidents and hurt his back in each accident. The jury found the Burlington Northern negligent with regard to the second accident only. On appeal, the plaintiff complained there was insufficient evidence from which the jury could apportion his injuries between his pre-existing back condition and the two workplace accidents.

The Tenth Circuit held there was enough evidence to permit the jury to apportion damages, and went on to say: "The extent to which an injury is attributable to a preexisting condition or prior accident need not be proved with mathematical precision or great exactitude. The evidence need only be sufficient to permit a rough practical apportionment." *Sauer*, 106 F. 3d at 1494 (citations omitted).

In addition, the *Sauer* Court also noted that apportionment can be proved *without expert testimony* stating the percentage of injury attributable to the different causes. *Sauer*, 106 F.3d at 1494. Apportionment is an issue for the jury. *Id*. at 1494.[7]

Two of the six cases involved in this action exemplify the need for apportionment of causation and damages in FELA

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[7] West Virginia judges in FELA trials routinely give clear instructions to juries that a railroad defendant is liable *only* for the damages it has caused, and *is not* liable in damages for other health problems or for the proportion of a plaintiffs injury not caused by the railroad's negligence.

For example, Judge Charles Haden II in *Gradis Boyd, et al. v. CSX Transportation*, U.S.D.C., S.D. of W.Va., Docket No. 3:87-0973 instructed the jury:

> The defendant is not to be held responsible for any hearing loss or tinnitus or both which the plaintiff may have suffered which resulted from any cause other than the negligence proven by the evidence. Any hearing loss or tinnitus which you find to be attributable to any other cause and which was not the direct result of negligence of the defendant, as proven by the evidence, would not be a part of this action and that should not be considered by you.

Judge Kendrick King in *James E. Perry v. N&W*, Civil Action No. 93-C-762, Circuit Court of McDowell County, West Virginia instructed the jury:

> If you find that any of the plaintiff's claimed damages are due in part, no matter how large or small, to any cause other than the defendant's negligence, the defendant is not financially responsible for that other part.

In *Keith Peyton v. CSXT*, Civil Action No. 91-C-101, Circuit Court of Boone County, West Virginia, Judge E. Lee Schlaegel, Jr. instructed the jury:

> In this matter the defendant is only responsible to pay damages to the plaintiff for that portion of his injury, if any, that were caused by its negligence. Therefore if you find that the plaintiff's condition was caused by factors other than the acts or failures to act by the defendant, if any, whether the other cause to be as a result of the plaintiff's own conduct or some other factor the defendant cannot be held responsible for that percentage of plaintiff's condition.

cases. Dr. Gaziano, plaintiff's retained witness, made a diagnosis of mixed dust pneumoconiosis in Carl Butler's case. *TT* Pg. 183, April 16, 1998. According to Dr. Gaziano, a mixed dust pneumoconiosis is caused by exposure to more than one type of dust. *TT* Pg. 164, April 16, 1998. Dr. Gaziano admitted that Mr. Butler did not tell him that he was exposed to sand or coal dust while employed by the railroad thus, in Dr. Gaziano's opinion, any injury to Mr. Butler caused by sand or coal dust exposure was not caused by his railroad employment. *TT* Pg. 182, April 16, 1998. Dr. Gaziano admitted that, at most, Mr. Butler's three month opportunity for exposure to asbestos while employed by the railroad played only a minimal role in his alleged development of disease; the majority of his exposure having occurred during his 33 year career as a union pipefitter. *TT* Pg. 182, April 16, 1998. The jury awarded Mr. Butler one million forty-seven thousand dollars ($1,047,000). *TT* Pgs. 8-12, April 29, 1998.

Plaintiffs' retained witness, Dr. Gaziano, testified that Freeman Ayers had asbestosis caused *equally* by Mr. Ayers' claimed exposure to asbestos while employed by the railroad and by Mr. Ayers' exposure to asbestos during his automotive maintenance career. *TT* Pg. 132, April 16, 1998. Freeman Ayers was awarded damages in the amount of nine hundred thirteen thousand eight hundred sixty dollars ($913,860). *TT* Pgs. 8-12, April 29, 1998.

In both of these cases, causation of injury between different sources was established by plaintiffs' witness Dr. Gaziano. The trial court instructed the jury that all deductions for non-railroad exposures were to be made by the court not by the jury. *See* Judge MacQueen's Jury Instructions Charge at Pg. 7. The only deductions made by Judge MacQueen were partial setoffs for prior settlements which were of a de minimus nature.

Viewing the evidence in the light most favorable to the plaintiffs, the evidence at trial established that Carl Butler's claimed asbestos related disease was caused minimally, if at all, by his three month opportunity for exposure while employed by NSRC and the majority of his claimed asbestos related injury was caused by his thirty-three year non-railroad exposure history. Mr. Butler's claimed coal dust and silica induced disease was wholly attributed to his non-railroad employment. Mr. Ayers' claimed asbestos related disease was caused equally by his railroad and his non-railroad employment. On these facts, the court's instructions and jury verdict forms required the jury to find NSRC liable for the totality of plaintiffs' injuries if the jury found that plaintiffs' railroad employment contributed "however slightly" to plaintiffs' claimed injuries.

The FELA requires apportionment of causation of injury where a reasonable approximation can be made on the evidence presented. In these cases the evidence established clear partial causation of injury in work sites and situations over which the NSRC had no control. Requiring NSRC to bear the full brunt of the financial awards given to plaintiffs where NSRC had absolutely no control over the circumstance under which a large part of the plaintiffs' claimed exposures to asbestos and other dusts occurred is unconscionable. NSRC should only be required to bear responsibility for injury caused by employment with NSRC. This Court should grant NSRC's Petition for Appeal and order a new trial of these cases with specific instruction to the trial court to instruct the jury to apportion causation.

IV. THE COURT ERRED BY CONSOLIDATING THESE CASES FOR TRIAL

West Virginia Rules of Civil Procedure, Rule 42 (a) in pertinent part provides "[w]hen actions involving a common question of law or fact are pending before the court, it may

order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

West Virginia courts have previously discussed the type of actions which may properly be consolidated under West Virginia Rules of Civil Procedure 42. In *Holland v. Joyce*, 185 S.E.2d 505 (W.Va. 1971), the West Virginia Supreme Court of Appeals held that three civil actions had been properly consolidated for trial since they involved the same transaction or occurrence "to the extent that all involved the single issue of the proper distribution of the assets of the estate of Mary E. McClain, deceased, among her heirs." *Id.* at 510. In *Hawkins v. Glen Falls Ins. Co.*, 171 S.E. 645 (W.Va. 1933), the Court reviewed a case where two defendant insurance companies had been sued by several plaintiffs. The trial court had empaneled two juries to hear the separate claims against the two insurance company defendants. On appeal, the West Virginia Supreme Court of Appeals *disapproved* of this procedure, stating that it was apparent that the lower court obviously recognized the fact that consolidation of the two cases was not warranted. The Court made this observation despite the fact that the contracts of insurance from the two defendants were identical and that the plaintiffs sought recovery due to the loss of property covered by both policies. The Court observed "*under our judicial system every litigant is entitled to his day in court, and to the undivided attention of the court during the hearing of his case.*" *Id.* at 646 (emphasis added).

A state's flexibility and discretion regarding consolidation are limited by the 14th Amendment's requirement that, "at a minimum, . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (Harlan, J.); *see also Mathews*

v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (*quoting Armstrong, v. Manzo*, 380 U.S. 545, 552 (1965)).

Improper consolidation of cases, as in this action, can amount to a deprivation of a defendant's due process rights. When consolidation results in prejudice it violates a parties due process rights regardless of any efficiencies that might be achieved. *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920, 926 (1988) (The "paramount consideration at all times in the administration of justice is a fair and impartial trial to all litigants. Considerations of economy of time, money and convenience [of witnesses] must yield thereto." (*quoting Frasier v. 20th Century Fox Film Corp.*, 119 F.Supp. 495, 497 (D. Neb. 1954))); *Malcolm v. National Gypsum Co.*, 995 F.2d at 350 (2nd. Cir. 1993) ("[t]he benefits of efficiency can never be purchased at the cost of fairness"); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) ("considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice"); *Dupont v. Southern Pacific Co.*, 366 F.2d 193, 196 (5th Cir. 1966) ("[w]here prejudice to rights of the parties obviously results from the order of consolidation, the action of the trial judge has been held reversible error"); *Cain v. Armstrong World Industries*, 785 F. Supp. 1448, 1454-57 (S.D. Ala. 1992) (granting a new trial because consolidation resulted in prejudice); *Vallero v. Burlington Northern R. Co.*, 749 F.Supp. 908, 913 (C.D. Ill. 1990) ("a court should not order consolidation where the interests of any party would be prejudiced thereby.")

This Court has provided additional guidance in this area by defining criteria for assessing the appropriateness of consolidation. The guidelines include:

1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy;

2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits;

3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and

4) the relative expense to all concerned of the single-trial, multiple-trial alternatives.

State ex rel. Appalachian Power Co. v. Ranson, 438 S.E.2d 609, Syl. pt. 2 (1993).

In the case at bar, the prejudice to NSRC and the confusion occasioned by consolidation of these cases so outweighed the considerations of judicial dispatch and economy that this Court need only consider the first *Ranson* factor to find that NSRC's due process rights were violated. Courts have repeatedly held that when, as here, there are more factual differences than similarities between cases, consolidation leads to confusion and prejudice. *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 460-61 (E.D. Mich. 1985) (ruling that "[w]hen cases involve some common issues but individual issues predominate, consolidation should be denied"); *Henderson v. National Railroad Passenger Corp.*, 118 F.R.D. 440, 441 (N. D. Ill. 1987) (same); *Arroyo v. Chardon*, 90 F.R.D. 603, 605-06 (D.P.R. 1981) (denying motion to consolidate eight cases, when the issues were the same, but the facts of causation were different). The fact that there are *some* similarities only increases the likelihood that the jury

may ignore key distinctions and improperly treat all claims alike. *See Flintkote Co. v. Allis Chalmers Corp.*, 73 F.R.D. 463, 464-65 (S.D.N.Y. 1997); *accord, Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612, 616 (Tex. Ct. App. 1992) (denying consolidation of three cases, because it creates the opportunity to "bootstrap"); *Fleishman v. Prudential-Bache Securities, Inc.*, 103 F.R.D. 623 (E.D.Wis. 1984) (denying plaintiff's motion to consolidate five cases, because of varying strength of claims).[8]

Unlike a consolidated products liability case where the plaintiffs need only prove that a defective product was used at a particular worksite, each plaintiff in these cases had to prove that the railroad failed to furnish him a reasonably safe workplace. Resolution of this question for each plaintiff required the jury to evaluate a number of different jobs performed by each plaintiff, at a number of different work places, during vastly different time periods with different claimed exposures and different claimed disease processes.

Carl Butler was sixty-six years old at the time of trial. *TT* Pg. 209, April 16, 1998. He first worked for NSRC for about three months in 1951 as a machinist apprentice in the machine shop in Princeton, WV. *Id.* at Pg. 200. During this time frame Mr. Butler believed that he was exposed to asbestos. *Id.* at 202-203. Mr. Butler next worked for NSRC in 1956 and 1957 as a carman in the car yard at Princeton. *Id.* at 203. As related to Dr. Gaziano, Mr. Butler worked for thirty three years as a union pipefitter with significant exposure to asbestos. *Id.* at 95-96. Dr. Gaziano believed that Mr. Butler

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[8] *See* Bordens and Horowitz, THE LIMITS OF SAMPLING AND CONSOLIDATION IN MASS TORT TRIAL: JUSTICE IMPROVED OR JUSTICE ALTERED?, Volume 22, *Law and Psychology Review*, 43 (Spring 1988); Horowitz and Bordens, THE EFFECTS OF OUTLIER PRESENCE, PLAINTIFF POPULATION SIZE, AND AGGREGATION OF PLAINTIFFS OF SIMULATED CIVIL JURY DECISIONS, Volume 12, *Law and Human Behavior*, No. 3 (1988).

had a mixed dust pneumoconiosis including asbestos lung disease which caused a mild obstructive lung impairment. *Id.* at 99-100. Dr. Renn testified that Mr. Butler did not have a pneumoconiosis and that his pulmonary function was normal. *TT* Pgs. 124, 125 & 127, April 22, 1998.

Freeman Ayers was seventy years old at the time of the trial with a fifty pack year smoking history. *TT* Pg. 3, April 17, 1998; *TT* Pg. 100, April 22, 1998. He went to work for NSRC in Princeton in either 1946 or 1947 where he worked as a mechanics helper/laborer for about two-and-a-half years. *TT* Pgs. 8 & 15.. After getting laid off from the railroad, Mr. Ayers returned to railroad employment at Elmore, WV where he worked 10-11 years as a yard brakeman before leaving railroad employment in 1961-62. *TT* Pgs. 16 & 20, April 17, 1998.

Plaintiffs retained witness, Dr. Gaziano, testified that Mr. Ayers had asbestosis caused *equally* by Mr. Ayers' claimed exposure to asbestos while employed by the railroad and by Mr. Ayers' exposure to asbestos during his automotive maintenance career. *TT* Pg. 132, April 16, 1998. Mr. Ayers had a career ending heart attack in 1985. *Id.* at 127. Dr. Gaziano believed that Mr. Ayers moderate obstructive ventilatory impairment was caused solely by heavy cigarette smoking. *Id.* at 128. Defendant's expert, Dr. Joseph Renn, testified that Mr. Ayers did not have a pneumoconiosis. *TT* Pg. 98, April 22, 1998. Dr. Renn believed that Mr. Ayers had a mild obstructive lung impairment caused by his 40-50 pack year smoking history. *TT* Pg. 100, April 22, 1998.

At the time of trial, Doyle Johnson was sixty years old. *TT* Pg. 5, April 17, 1998. Mr. Johnson had a thirty-four to sixty-four pack year smoking history. *TT* Pg. 101, April 22, 1998. Mr. Johnson worked primarily as a maintenance of way worker but also as a laborer and welder helper, and maintenance of way worker for NSRC in and around

Williamson, West Virginia from 1952 to 1987. *TT* Pgs. 7, 16, 20, & 50, April 17, 1998.

Dr. Gaziano believed Mr. Johnson's chest x-ray showed "a very minimal change of 1/0" and an asymptomatic pleural plaque. *Id.* at 122. Dr. Gaziano testified that Mr. Johnson had a mild obstruction caused equally by smoking and dust exposure and a reduction in diffusing capacity caused primarily by dust exposure. *Id.* at 124. Dr. Renn testified that the plaintiff did not have a pneumoconiosis but did have a mild obstructive ventilatory impairment and a reduction in diffusing capacity for carbon monoxide caused respectively by asthma and a pulmonary embolus following casting of his knee in 1987. *TT* Pgs. 101, 102,105 & 106.

John Shirley was sixty-nine years old at the time of trial. *TT* Pg. 03, April 17, 1998. He worked intermittently at different locations as a clerk, car supply man, laborer, yard checker, crew dispatcher, extra gang foreman and warehouse foreman for the railroad from 1947 until 1976 when he took a disability retirement after injuring his back. *TT* Pgs. 6, 7 & 8, April 17, 1998.

Dr. Gaziano believed that Mr. Shirley had a mixed dust pneumoconiosis, normal pulmonary function and a reduced diffusing capacity. *TT* Pg. 114, April 16, 1998. Dr. Renn testified that the plaintiff did not a have a pneumoconiosis or a pulmonary function impairment. *TT* Pgs. 117 & 119, April 22, 1998. Mr. Shirley also suffered from nocturnal dypsnea, two pillow orthopnea, and prior heart failure. *Id.* at 114, 115.

James Spangler was seventy-three years old at the time of trial. He worked for NSRC for approximately twenty four years as a pipefitter/sheetmetal worker at Princeton, WV and Narrows, VA. He also worked for the C&O Railroad and had admitted exposure to asbestos while in the Navy. *TT* Pg. 133, April 16, 1998.

Dr. Gaziano testified that Mr. Spangler had an obstructive lung impairment as a consequence of his chronic obstructive pulmonary disease and bullous emphysema both of which were caused solely by cigarette smoking. *TT* Pg. 133-136, April 16, 1998. Dr. Gaziano also found a decreased diffusion capacity which he attributed to both smoking and asbestos exposure. He reported a one hundred twelve pack year smoking history to Dr. Renn. *TT* Pg. 81, April 22, 1998. Dr. Renn testified that Mr. Spangler did not have a pneumoconiosis but instead suffered from a severe cigarette smoking induced bronchoreversible obstructive ventilatory defect which included emphysema. *TT* Pg. 86, April 22, 1998.

Clifford Vance was seventy-seven years old at the time of trial. *TT* Pg. 171, April 15, 1998. Mr. Vance worked as a laborer and hostler for NSRC from 1942 to 1969 and from 1967 until 1981 when he took a regular retirement based on his years of service. *Id.* at 174, 181, 184, 189, 190, 191 & 193, April 15, 1998. He worked at a variety of locations including Iaeger and Bluefield. *Id.* at 174 & 191.

Dr. Gaziano testified that Mr. Vance had asbestosis with a mild degree of pulmonary impairment. *TT* Pg. 76, April 16, 1998. Dr. Renn testified that the plaintiff did not have a pneumoconiosis or a ventilatory impairment despite having a forty-seven to seventy-one pack year smoking history. *TT* Pgs. 108 & 111, April 22, 1998.

Each plaintiff had the burden of proving that NSRC failed to provide a reasonably safe workplace. The evidence to establish this point, as to time frame worked, job performed and location, was markedly different from plaintiff to plaintiff. There was no common question of fact as to whether NSRC provided a reasonably safe work place to each plaintiff.

The evidence of claimed injury presented by each plaintiff was factually specific and different from plaintiff to plaintiff.

Each plaintiff's smoking history was relevant to the individual claims. Each plaintiff's physical condition and prior medical history was different. All of the plaintiffs had different non-railroad work histories which were important facts for the jury's consideration. Consolidation of these cases in light of all the factual differences operated to deprive NSRC of its due process rights by bootstrapping these cases into a single unit which prevented the jury from being able to adequately appreciate and differentiate between these plaintiffs. Accordingly, this Court should grant NSRC's Petition for Appeal and ultimately remand these cases for individual trials.

V. THE COURT ERRED IN PREVENTING DEFENDANT FROM INQUIRING INTO ACCRUAL OF THE STATUTE OF LIMITATIONS AND IN REFUSING TO INSTRUCT THE JURY ON THE STATUTE OF LIMITATIONS

Under the FELA, *the plaintiff* has a duty to prove that his action was timely filed, within three years after the cause of action accrued. *Emmons v. Southern Pacific Co.*, 701 F.2d 1112 (5th Cir. 1983); *Carpenter v. Erie R. Co.*, 132 F.2d 362, 363 (3rd Cir. 1942), *cert. denied*, 318 U.S. 788, 63 S.Ct. 983, 87 L.Ed. 1155 (1943). In a FELA occupational disease case the cause of action accrues when the symptoms of the disease manifest themselves. A FELA plaintiff has an affirmative duty to investigate the nature and cause of his injury once it is known to him. The FELA statute of limitations is found at 45 U.S.C. § 56, which states in pertinent part: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." Under the FELA, a cause of action accrues when the plaintiff is or should be aware that he has been injured. This same test applies whether the alleged injury is the result of a traumatic incident which produces immediate results of an injury or

some event or events which produce a purely latent injury in which the results of the injury do not manifest themselves until several years later. *See, Urie v. Thompson*, 337 U.S. 163 (1949); *Young v. Clinchfield Railroad Co.*, 288 F.2d 499 (4th Cir. 1961); *See also, Kichline v. Consolidated Rail Corp.*, 800 F.2d 356 (3rd Cir. 1986); *Albertson v. T. J. Stevenson & Co.*, 749 F.2d 223 (5th Cir. 1984); *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112 (5th Cir. 1983). As set forth below, in alleged occupational disease cases like the instant action, *the cause of action accrues when the symptoms manifest themselves*. The United States Court of Appeals for the Fourth Circuit in *Townley v. Norfolk & Western Ry. Co.*, 887 F.2d 498 (4th Cir. 1989) explained the holding of the United States Supreme Court in *Urie* and its own holding in Young:

> The plaintiff in *Urie* claimed years of working as a fireman on a steam locomotive had left him with silicosis; he brought suit against the railroad under FELA. The Supreme Court held that *a cause of action for an occupational disease accrues under FELA only when the symptoms of the disease become apparent to the plaintiff*. The Court stated:
>
> "It follows that no specific date of contact with the substance can be charged with being the date of inquiry, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; *consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves. . . .*" *Urie*, 337 U.S. at 170, 69 S.Ct. at 1025.
>
> To hold otherwise, the Court reasoned, would defeat the legislative intent behind FELA and force blameless plaintiffs to lose their legal remedy simply because they *could not diagnose a hidden affliction* within the applicable statute of limitations. *Id.*

> In Young, we interpreted *Urie* to mean that a cause of action under FELA for an occupational disease does not accrue when the injury is inflicted, but rather when the plaintiff becomes, or should have become, aware of his injury.
>
> . . . The cause of action accrues only when the plaintiff has reason to know he has been injured. Generally this will be when his condition is diagnosed, unless it is shown that the plaintiff 'should have known' at an earlier date that he was injured. 288 F.2d at 503 (emphasis added).

Townley, 887 F.2d at 500-1.

It has been held by the United States Supreme Court and lower federal appellate and district courts that claimants under a federal act generally and FELA plaintiffs particularly have *an affirmative duty* to investigate their alleged injuries after they either know or should know of them. The United States Supreme Court in *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), set forth the modern test for assessing the accrual of federal causes of action. In *Kubrick*, the plaintiff had been admitted to a Veteran's Administration Hospital for the treatment of an infection. After surgery, he received an antibiotic which was ototoxic and caused the plaintiff to experience deafness. Subsequently, the plaintiff learned that his hearing loss was due to the administration of the antibiotic, but did not file his Federal Tort Claims Act (FTCA) lawsuit within the appropriate limitations period. On appeal, the plaintiff contended that his cause of action did not accrue until he was aware that the physician at the Veteran's Admistration Hospital had committed malpractice in administering the antibiotic. The Supreme Court rejected this argument, saying:

> We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the

> plaintiff that his injury was negligently inflicted. *A plaintiff* such as Kubrick, *armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community*. To excuse him from properly doing so by postponing the accrual of his claim would undermine the purpose of a limitation statute, which is to require the reasonably diligent presentation of tort claims against the Government. . . . [T]he putative malpractice *plaintiff must determine within the period of limitations whether to sue or not*, which is precisely the judgment that other tort claimants must make. If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, *we discern no sound reason for visiting the consequences of such error on the Defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit*. . . .

Kubrick, 444 U.S. at 123-24 (emphasis added).

The rule stated in *Kubrick* has been applied in cases arising under the FELA. *See Albert v. Maine Central R. Co.*, 905 F.2d 541 (lst Cir. 1990); *Kichline v. Consolidated Rail Corp.*, 800 F.2d 356 (3rd Cir. 1986); *Townley v. N&W Ry. Co.*, 887 F.2d 498 (4th Cir. 1989); *Dubose v. Kansas City. Southern Railway Co.*, 729 F.2d 1026 (5th Cir. 1984); *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092 (7th Cir. 1990); *Jones v. Maine Cent. R.R. Co.*, 690 F.Supp. 73 (D.Me. 1988).

In *Townley v. Norfolk and Western R y. Co.*, 690 F.Supp. 1513 (S.D.W.Va. 1988), the District Court determined that the judicial trend is to apply *Kubrick* in FELA cases to determine when a cause of action accrues, saying:

> Although this Court recognizes the harshness of the result, this Court believes that the *Kubrick* standard governs the disposition of this matter: The judicial trend seems to be to apply *Kubrick* in FELA actions to

> determine the running of the statute of limitations. *Kubrick* effectuates a policy of encouraging the prompt presentation of claims and adheres to the purposes of the statutes of limitations. As stated in *Kichline*, "The Court in *Kubrick* cautioned that a plaintiff can and must 'protect himself by seeking advice in the medical and legal community'. . . and 'must determine within the period of limitations whether to sue or not.'" *Kichline*, 800 F.2d at 359.

Townley, 690 F.Supp. at 1515 *affirmed Townlev v. N&W RY. Co.*, 887 F.2d 498 (4th Cir. 1989).

It is not necessary for purposes of accrual under § 56 that a plaintiff have actual knowledge of the extent of his injury or its governing cause. *Fries*, 909 F.2d. at 1096. With respect to injury, a plaintiff need not be formally advised or receive a medical diagnosis by a physician as to the extent of his injury for a FELA claim to accrue. *Frasure v. Union Pac. R.R. Co.*, 782 F. Supp. 477, 480 (C.D. Cal. 1991)(citations omitted). With respect to causation, an injured plaintiff need not have actual knowledge that his injury has been caused by his work. *Fries*, 909 F.2d at 1096; *Albert*, 905 F.2d at 544. Once a plaintiff suffers symptoms of an injury he is under an affirmative duty to investigate his injury and any suspect cause. *Fries*, 909 F.2d at 1095-96.

The law governing accrual of actions under FELA requires "an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause." *Fries*, 909 F.2d at 1094. The court did not allow defendant to conduct an objective inquiry into when the plaintiffs knew or should have known the essential facts of injury and cause.

Plaintiff Carl Butler last worked for NSRC in a position where he believed he may have been exposed to asbestos in 1951, forty-seven years before his case against NSRC was

tried. *TT* Pgs. 200 & 203, April 16, 1998. Freeman Ayers last worked for NSRC in 1961-62. *TT* Pg. 100, April 22, 1998. Doyle Johnson last worked for NSRC in 1987. *TT* Pg. 50, April 17, 1998. John Shirley's last work for NSRC occurred in 1976. *TT* Pg. 7, April 17, 1998. James Spangler last worked for NSRC in 1980. *TT* Pg. 55, April 20, 1998. Clifford Vance last worked for NSRC in 1981. *TT* Pg. 193, April 22, 1998.

The court prevented defendant from inquiry into the symptoms plaintiffs were experiencing that prompted them to contact an attorney. The court also prevented defendant from adducing when plaintiffs first contacted an attorney in regard to their claimed injury.[9] This line of questioning was clearly relevant. It is only logical that plaintiffs must have been experiencing symptoms of their claimed illness at or before the time they contacted an attorney; unless they were experiencing symptoms, which is sufficient under the FELA to trigger the running of the statute of limitations, why would the plaintiffs have sought legal counsel?

The FELA places an affirmative duty on plaintiffs to prove that their cases were timely filed. The court not only allowed these cases to proceed without requiring plaintiffs to affirmatively prove that their cases were timely filed but also deprived NSRC of the opportunity to prove that the cases were not timely filed. After refusing to allow NSRC to develop evidence regarding when plaintiffs first experienced symptoms sufficient to prompt them to contact an attorney, the court refused to instruct the jury on the statute of

[9] Respondents argue that the court only prevented petitioner from inquiring about how plaintiffs met their counsel (mass media solicitation) and that petitioner failed to offer a proffer of evidence on this issue. This issue was extensively argued during the trial. The type of information and the basis for the information petitioner hoped to obtained was laboriously explained to the court. *TT* Pgs.179-184, April 14, 1998 and *TT* Pgs. 27-30, April 23, 1998.

limitations or place this issue on the jury verdict forms. See NSRC's Request For Charge No. 15. This error compels that a new trial be held in these cases with defendant having the opportunity to fully develop the evidence on this issue.

VI. A NEW TRIAL OR REMITTITUR IS WARRANTED BECAUSE THE JURY'S VERDICTS WERE NOT SUPPORTED BY THE EVIDENCE AND WERE GROSSLY EXCESSIVE

In evaluating whether a new trial is warranted under the facts of a particular case, a court must consider whether any verdict returned in the trial is excessive, thereby justifying a new trial on all issues or, alternatively, a remittitur of a portion of the damage award. Under West Virginia law, a jury verdict is excessive and must be set aside if it is "monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice, or corruption." *Addair v. Majestic Petroleum Co. , Inc.*, 160 W. Va. 105, 232 S.E.2d 821, 825 (1977). While determining whether a jury's verdict is excessive necessarily "entails a largely subjective exercise on the part of the judge," courts must nonetheless carefully examine jury awards not only to ensure that they are not the result of improper motivation such as passion or prejudice, but also to ensure that the verdict is reasonable in terms of both the facts of the case and the overall system of resolving tort claims. *See Roberts v. Stephens Clinic Hospital, Inc.*, 176 W.Va. 492, 345 S.E.2d 791, 800 (1986); *See also Central of Georgia R.R. Co. v. Swindle*, 398 S.E.2d 365, 366 (1990) and *CSX Transportation, Inc. v. Levant*, 417 S.E.2d 320 (Ga. 1992) (FELA cases in which a new trial or remittitur was ordered based on exceptionally large verdicts).

Plaintiffs made no claims for lost wages in these cases. As set forth in the previous section of this Petition, plaintiffs' ages at the time of trial ranged from sixty to seventy-seven,

the diagnoses made by plaintiffs' retained physician were different from plaintiff to plaintiff, the plaintiffs' claimed impairments from both smoking and dust exposure were markedly different ranging from mild to moderate, plaintiffs' claimed fear of cancer was in large part due solely to the plaintiffs' individual smoking histories. The verdicts bear no relationship to the individual factors present in each plaintiff's case and are "monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and manifestly show jury passion, partiality, prejudice, or corruption." The jury's awards must be vacated and a new trial ordered; alternatively, a substantial portion of the jury's verdicts remitted.

RELIEF PRAYED FOR

Significant legal issues are raised in the manner in which Judge MacQueen conducted this trial. This Court has been reluctant to grant appeals in asbestos cases. However, given the number of FELA cases pending in this state and the number of substantive issues raised in this case applicable to FELA cases, this Court needs to provide guidance to the circuit courts on the law applicable to FELA cases. It is clear that inconsistencies exist within the circuit courts on the apportionment issue, state-of-the-art issue, fear of cancer and increased risk of cancer issue, consolidation issue and the substantive differences between FELA and West Virginia Law. One of the primary functions of this Court is to guide circuit courts to prevent inconsistent and ad hoc application of the law as it affects the substantive rights of litigants. This defendant and other railroad defendants with cases pending in various circuit courts of West Virginia have been subjected to this inconsistent application of the FELA. This Court should grant the Appeal in this case to clarify and guide circuit courts in the application of the FELA.

WHEREFORE, Norfolk Southern Railway Company prays that its Petition for Appeal be GRANTED.

NORFOLK SOUTHERN RAILWAY COMPANY

By /s/ Fred Adkins
FRED ADKINS
Of Counsel

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In Re: FELA ASBESTOS LITIGATION
Case No. CP-84-1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

In Re: ASBESTOS-RELATED FELA CASES:
OKLA A. JUDD and
CORA B. JUDD, et al.,

Plaintiffs,

vs.

THE CHESAPEAKE AND OHIO RAILWAY
COMPANY, a Virginia Corporation,

Defendants.

Nos. 83-3035 83-3036
83-3037 83-3038
83-3039 83-3040
83-3041 83-3042
83-3043 83-3044
83-3045 83-3244
83-3245 83-3246
83-3247 83-3248
83-3249 83-3250
83-3251 83-3252
83-3253 83-3254
83-3255 , et seq.

GERRIT W. H. SCHEPLRS, M.D.

VOLUME 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Nos. 82-2301 through
83-2306, 82-2308 through
83-2317, 83-299 through
83-310, 83-400, and 83-2227

THERESA R. LECHNER, individually
and as Administratrix of the
Estate of GEORGE P. LECHNER,
Deceased,

Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION, et al.,

Defendants.

No. 82-2897

GLENN E. PERRY and DOLLIE L. PERRY,
his wife,

Plaintiffs,

vs.

CONSOLIDATED RAIL CORPORATION, et al.,

Defendants.

DEPOSITION OF GERRIT W. H. SCHEPERS, M.D. a witness, taken on behalf of the Plaintiffs, on the 8th day of October, 1984, at the studios of KMBC-TV, 11th and Central, Kansas City, Missouri.

* * * *

[48] occasions in negotiations on the stipulation, and in fact, I refused to sign the stipulation when part of the stipulation was Mr. White was going to be examining.

MR. JORDAN: I don't think there is anything in the record indicting any objection on behalf of the plaintiffs, so it's our position that they have waved that objection.

MR. MIDDLETON: Richard Middleton for those plaintiffs represented by Middleton & Anderson and Brobyn & Forceno. We adopt the reservations and objections of Mr. Rice as well.

MR. WHITE: Let me just state for the record, your Honor, that no such objections to my taking this deposition have been raised before today either by Mr. Davies or any other counsel representing a manufacturer or anyone in Mr. Rice's firm, and indeed there is no conflict which will be apparent when it's delved into.

(Short recess)

Q. (By Mr. Rice) Dr. Schepers, could you tell us what diseases in human beings are considered to be or can be asbestos-related diseases or occur as a result of asbestos exposure?

A. Simplitus asbetosis, which is the disease of the lungs itself and the pleura around it. That's the mantle [49] around the lung. Secondly, cancer of the lung itself. Thirdly, cancer of the lining membranes of the chest and of the abdominal cavity. And fourthly, cancers in different parts of the body, such as the larynx, that's the throat, of the stomach and the intestinal tract. Those have all been traced back as being caused by asbestos dust.

Q. Doctor, I want to talk with you briefly about the disease known as asbestosis. Could you tell us when the disease was started to be referring to or referred to as the term asbestosis, was named as a disease entity?

A. When it was first—

Q. Named as a disease entity, independent of any other disease.

A. The disease was first described as a clinical condition occuring in workers in asbestos factories in 1899 by the inspectors of factories of the British government. The first case of the disease was subjected to an autopsy analysis, in other words an after-death study of the body, in 1902. It was described in 1904 by Dr. Montague Murray. The asbestos content of the disease, in other words of the lungs, and the fact that it was the asbestos fiber that caused the disease was first recognized in 1924 and from then

* * * *

[52] Only when the cumulative effects of many years of dust exposure or the cumulative effects of the initial exposure with a progression of the disease in relation to that initial exposure, because both factors are involved, only then will the disease become so severe that it can be diagnosed and described as asbestosis, and so in that sense it is a latent disease, yes.

Q. Doctor, if a person, worker, is found to have asbestosis and that person has worked around asbestos dust or with asbestos dust for a period of let's say over ten years, is there any way that you know of to single out or to identify the year that he had the harmful exposure or the particular fiber that is doing the damage? Is there any way to single it out at all?

MR. WHITE: Object to the form of the question.

MAGISTRATE HAMILTON: Overruled.

A. No, there is not. If the person dies and you can obtain tissue or if you can do an operation on his lung and take a piece of tissue out of the lung, you can identify asbestos fibers of a specific type. You can, for instance, determine by means of an electron microscope whether the fiber is this type of fiber or that type of fiber, but you won't be able to say

when that fiber reached the lung. Because it could be the fiber—the first fiber that got into his lung that you are looking at or it could be the last one that you are looking at.

Q. (By Mr. Rice) Doctor, are asbestos-related diseases, and particularly asbestosis, are they considered to be progressive diseases?

A. Yes, they are invariably progressive in the sense that the asbestos fiber tends to remain in the lung tissue and tends to irritate and damage the lung tissues as time passes and irritate the new fibers that—the new cells that are formed in the lung. The lung keeps on forming new cells. It's what you call a deciduous organ, in other words, it replaces itself every so often. And so there are constantly new cells and structures formed in the lung, but since the asbestos remains behind, the asbetos, which is already there, will keep on damaging these new cells, and so in that way more and more disease process is created.

Q. Doctor, does science at any point in time, is science aware of a method to go into the lung and remove the asbestos fibers that are in the lung?

A. No, there is no known way of removing the asbestos. There have been experiments made to attempt to neutralize them with different chemical substances, but none of these experiments have been successful.

* * * *

[86] here the documents we just read so that the jury may read them with us. I believe, Doctor, pointing now to the board we read the first three paragraphs here; is that correct?

A. Yes.

Q. All right. Doctor, this whole discussion about pneumoconiosis, is this consistent with what you understood the disease process of pneumoconiosis to be in the 1930s?

A. Yes.

Q. Let me show you Page 62 of the 1932 Medical and Surgical minutes.

MR. WHITE: Your Honor, we object to the use of a pointer by Mr. Rice. We object to the form of the question in the terms of his using the pointer.

MAGISTRATE HAMILTON: Overruled.

Q. (By Mr. Rice) Doctor, there's a statement here on Page 62 that says dust inhalation renders the lung susceptible to reoccurrent infection and to tuberculosis—and tuberculosis is also superimposed particularly in the second and third stages. Do you see that?

A. Yes, sir.

Q. Does asbestosis render the lung suceptible to additional infections and additional damage?

[57] A. Yes, it does.

Q. Has it always been known to do so?

A. Yes, sir.

Q. Doctor, I believe we also read the paragraph dust pathology of the lungs can be prevented in two ways, talked about wet down and ventilation. Has that always been a concept, in order to prevent dust disease you prevent exposure?

A. Yes.

Q. Is that the way you understood it in the 1930s?

A. Yes.

Q. Doctor, reading in the last paragraph or the conclusion of that section entitled Dust As An Industrial Hazard presented in 1932 by the Medical and Surgical Section of the Aerican Railway Association.

A. Well, what it says there is in conclusion we wish to emphasize the fact that under certain conditions inhalation of dust causes a fibrosis of the lungs known as pneumoconiosis and that this is an industrial hazard but that it can be prevented by proper use of water and ventilation, that after

fibrosis develops secondary infection is prone to occur and tuberculosis is often ingrafted on the fibrosis and the radio graphic examination is the easiest and most reliable means of diagnosis.

* * * *

[118] Q. Doctor, I want you to focus with me on the threshold limit value of five million particles per cubic foot of air; and I ask you, sir, if you can see the dust in the air, does that quantity of dust exceed five million particles per cubic foot of air.

MR. WHITE: I object to the form of the question.

MAGISTRATE HAMILTON: Overruled.

A. If you can see the dust with your naked eye, then the amount of dust particles of the kind we are talking about would be in the range of many hundreds of millions of dust particles, more nearly 700 million particles of dust. This is many, many multiples of even the largest thresholds limit value that has been proposed in connection with asbestosis. The largest number I know of is, as far as I recall, 10 million particles per cubic foot of air. Well, you would not see that in the air. It would be invisible.

Q. (BY MR. RICE) Doctor, was the concept of the TLV to be taken independent of other preventive measures or were they to be ruled as—together as an engineering guideline?

MR. WHITE: I object to the form of the question.

MAGISTRATE HAMILTON: Overruled.

* * * *

[121] for you in the area of asbestosis. I would like now to talk with you a bit about the other—one of the other diseases you have told us was related to asbestosis, that being cancer of the lung.

A. All right.

Q. Sir, if a individual worker has an occupational exposure to asbestos, can you state within a reasonable degree of medical certainty whether or not that worker has an increased risk of developing bronchgenic carciroma or lung cancer—

MR. WHITE: I object to the form of—

Q. (BY MR. RICE)—relating to the asbestos?

MR. WHITE: I object to the form of the question.

MAGISTRATE HAMILTON: Overruled.

A. Yes.

Q. (BY MR. RICE) and what is that opinion based on, doctor?

A. It's based on the historical demonstration through publications and scientific studies, as that there is increased prevalence of lung cancer in persons who have asbestosis from about 1933 onwards. There have been publications by different doctors correlating the occurrence of asbest—of cancer in persons with asbestosis; and this correlation built up over the [122] years, that past, so that progressively it became evident that a high percentage of persons with asbestosis have lung cancer. In fact, such a high percentage that it was exceptional for any industry comparable to the asbestos industry. It was exceptional for any disease comparable to asbestosis. No other cust-caused disease has as much cancer of the lung associated with it as asbestos does, and that became progressively known through the early 1930s and the early 1940s.

There were also experiments made by scientists who exposed animals to asbestos dust and who demonstrated from about 1942 onwards in Germany by Dr. Noromann, in the Saranac Laboratory by Dr. Gardner, that the mere exposure of certain animals to asbestos dust, apart from the disease,

asbestosis, leads to cancer of the lungs of those animals. Those two bodies of knowledge eatablished by 1949 the perception in the Journal of the American Medical Association, in its editorial, that asbestosis and asbestos exposure are associated with lung cancer.

Q. Okay.

A. Various countries started making laws, workmen's compensation laws, declaring lung cancer occurring in association with asbestosis to be [123] compensable, as if they were caused by the dust. For instance, Germany in 1942, and Czechoslovakia in 1945, England in 1953, South Africa in 1955, and so forth.

Q. Doctor, this question may seem somewhat repetitious to you, but I need to ask it for the rules that we have to follow in court. Doctor, do you have an opinion within a reasonable degree of medical certainty, based upon your education, your experience, your study, and your knowledge of the medical and scientific literature, as to when it was known and knowable in the medical and scientific community that there was an association between asbestos and lung cancer in human beings?

UNIDENTIFIED SPEAKER: I object to the form.

MR. WHITE: I object to the form of the question.

MAGISTRATE HAMILTON: Overruled.

A. Yes, I have such an opinion.

Q. (BY MR. RICE) And can you tell us what that opinion is, please, sir?

A. I think that knowledge was available from the 1945 period on. There was no question about it.

Q. Doctor, let me call your attention back to the AAN documents for one moment. I want to look with you

* * * *